

In The Matter Of:
United States vs.
PFC Bradley E. Manning

Vol. 18
July 15, 2013
UNOFFICIAL DRAFT-07/15/13 Afternoon Session

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VOLUME XVIII
IN THE UNITED STATES ARMY
UNITED STATES
VS.
MANNING, Bradley E., PFC COURT-MARTIAL
U.S. Army, xxx-xx-9504
Headquarters and Headquarters Company,
U.S. Army Garrison,
Joint Base Myer-Henderson Hall,
Fort Myer, VA 22211
_____ /

The Hearing in the above-entitled matter was
continued on Monday, July 15, 2013, at 3:00 p.m., at
Fort Meade, Maryland, before the Honorable Colonel
Denise Lind, Judge.

DISCLAIMER

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1 APPEARANCES :

2
3 ON BEHALF OF GOVERNMENT :

4 MAJOR ASHDEN FEIN

5 CAPTAIN JOSEPH MORROW

6 CAPTAIN ANGEL OVERGAARD

7 CAPTAIN HUNTER WHYTE

8 CAPTAIN ALEXANDER von ELTEN

9
10 ON BEHALF OF ACCUSED :

11 DAVID COOMBS

12 CAPTAIN JOSHUA TOOMAN

13 MAJOR THOMAS HURLEY

1 PROCEEDINGS

2 THE COURT: The Court is called to order.
3 Mr. Fein, please account for the parties.

4 MAJOR FEIN: All parties in the Court when
5 last recessed are again present with the following
6 exception, Mr. Chavez, Court Reporter is absent. Mr.
7 Robert Shaw, Court Reporter is present.

8 Also, Your Honor, as of 1449 this
9 afternoon there are 19 members of the media at the
10 Media Operation Center, one stenographer, 25 spectators
11 in the courtroom and 10 spectators in overflow trailer.

12 THE COURT: All right. Mr. Fein, before I
13 ask you about new filings, I just want to put on the
14 record the Court made a second amendment to the draft
15 instructions based on the Government's advisal to me
16 they were removing, or no longer pursuing the
17 classified enemy with respect to the specification of
18 Charge 1 of Charge 1, aiding the enemy.

19 That ruling reads for the specification
20 Charge One, aiding the enemy, in violation of Article
21 104 UCMJ, the Government advised the Court it is not

1 offering evidence that Pfc Manning knowingly gave
2 intelligence to a classified entity specified in Bates
3 Number 00410660-00410664.

4 Accordingly, the Court makes the
5 following amendment in the instruction for the
6 specification of Charge One at AE410, change current
7 Instruction 1 that at or near contingency Operation
8 Station Hammer Iraq between on or about 1 November 2009
9 and on or about 27 May 2010, the accused without proper
10 authority knowingly gave intelligence information to
11 certain persons, namely al-Qaida, al-Qaida in the
12 Arabian Peninsula and an entity specified in Bates
13 Number 00410660 through 00410664 classified entity.

14 Amended instruction states, one Adamere
15 Contingency Hammer Station contingency operator station
16 Hammer Iraq between on or about 1 November 2009 and on
17 or about 27 May 2010, the accused without proper
18 authority knowingly gave intelligence information to
19 certain persons; namely al-Qaida and al-Qaida in the
20 Arabian Peninsula.

21 So ordered this 15th day of July 2013.

1 It will be marked as the next Appellate Exhibit in
2 line.

3 Would you like to address the new
4 exhibits that have been filed?

5 CAPTAIN MORROW: Yes, ma'am. Your Honor,
6 there are five exhibits, total exhibits since the Court
7 last recessed. First, Appellate Exhibit 599 the
8 Government's response to Defense's Motion for Directed
9 Verdict for the 641 offenses.

10 Appellate Exhibit 600 is the
11 Government's response to Defense Motion for Directed
12 Verdict under 917. There are 104 offense and Exhibit
13 601 Government's expense to Motion for Directed Verdict
14 Under RCN 917, U.S. 1030 offense.

15 Appellate Exhibit 602 is the
16 Government's notice of a potential rebuttal case dated
17 15 July 2013. Appellate Exhibit 603 is Defense's reply
18 to the Government's response to the Defense's Motion
19 for Directed Verdict under 917 for the 641 offenses.

20 THE COURT: Thank you. Mr. Coombs, would you
21 like to set forth for the records emails traffic that

1 occurred between the Defense, well, between the parties
2 and Court, but directed toward the Defense, with
3 respect to the Motion to Dismiss, Motion for Finding
4 Not Guilty under 917 for 1030A offense, particularly
5 Specification 13 of Charge 2.

6 The Motion itself asks me to dismiss
7 that specification. I noted earlier that Pfc Manning
8 had entered a plea to a lesser included offense. I
9 wanted to clarify for the record what the Defense was
10 asking for.

11 MR. COOMBS: Yes, Your Honor. We are only
12 asking that the Court dismiss the greater offense. We
13 are not retracted Pfc Manning's plea to the lesser
14 included offense.

15 THE COURT: Thank you.

16 MR. COOMBS: Yes, your Honor.

17 THE COURT: Prior to coming on the record
18 today I met with counsel RCM 802 counsel which is where
19 counsel and I discussed scheduling and other issues
20 that may arise in the cases. And there were some
21 additional email traffic that went back and forth since

1 the last session involving Defense requested access to
2 the transcript of the proceedings. And the Government
3 is preparing to provide access to what has been
4 prepared thus far. Is that correct?

5 MAJOR FEIN: Yes, ma'am. The United States
6 has asked the Court Reporters to collate all of the
7 transcripts that have been finished by the pool of
8 court reporters from around the country and put those
9 together once an entire section for 139A complete
10 session is completed and compiled. Then we could give
11 that to all parties, including Government, Defense and
12 Court.

13 THE COURT: Thank you. Defense any issues
14 with that?

15 MR. COOMBS: No, Your Honor.

16 THE COURT: The parties had indicated the
17 Government had requested some additional discovery
18 material from the Defense pursuant to RCM 914 or our
19 equivalent of the Janxt Act.

20 Major Fein, would you like to set forth
21 what you are asking for and what has transpired.

1 MAJOR FEIN: Yes, ma'am. On Friday
2 afternoon, after the United States finished its filings
3 late Thursday night for the RCM 917 motions, we started
4 reviewing and preparing for an intense rebuttal case
5 and realized that the Defense referenced during the
6 testimony of Chief Ehresman in case in chief. A
7 specific email that the Defense sent to Ehresman that
8 Chief Ehresman responded to.

9 So the United States realized, after
10 reviewing its discovery, that we never received that
11 email in our typical discovery. So we went back to
12 look for it.

13 And we asked the Court, gave notice to
14 the Court that we would be asking today for the Defense
15 to produce any remaining RCM 914 Janxt material for any
16 of their witnesses that have testified, and
17 specifically that one email and any other similar
18 emails.

19 And then just to note for the record,
20 the United States has always maintained, with the
21 concurrence of the Defense and Court that statements

1 under RCM 914 do include potential emails that subject
2 matter the statement itself that would qualify as Janxt
3 or RCM 914 material, not necessarily being just an
4 email.

5 That was filed by the Government on 3
6 August, 2012. In fact, has produced emails throughout
7 pre-and post, not pre but pre-and trial discovery that
8 includes emails as part of Janxt material.

9 Also part of the Court calendars to lay
10 out this type of material. United States requested
11 Defense produce all that, any Janxt material, any
12 statements that relates to witnesses testimony.

13 And prior to this session we did receive
14 the one mail that we know about that was referenced by
15 Chief Ehresman.

16 THE COURT: Mr. Coombs.

17 MR. COOMBS: Yes, Your Honor. Appellate 270
18 was the Government's position on what they would
19 provide to the Defense. The Defense doesn't believe
20 that Janxt applies to emails. However, we did in good
21 faith, look at all of our emails with our 8 witnesses

1 to include the 9th witness, Chief Ehresman. We found
2 one email that was responsive potentially to what you
3 could consider to be Janxt material and provided that
4 to the Government.

5 THE COURT: All right. Do we have any
6 outstanding issues with Janxt?

7 MAJOR FEIN: For point of clarification,
8 Defense maintained until today that email weren't
9 included. So if they have reviewed all emails, ensured
10 that all witnesses, Government fine with that. Defense
11 did ascent to this in 270, was put on the record,
12 discussed ad nauseum between the parties.

13 So all that is correct, this was the
14 Government's position. Defined Janxt for this trial.
15 As long as nothing else is out there, the Government
16 has no issue going forward.

17 THE COURT: RCM 914 defines what material is
18 appropriated into Janxt. And it appears email may or
19 may not be incorporated as one issue was turned over.

20 At this point I don't see any need for
21 further litigation. Mr. Coombs, as an officer of the

1 Court, has advised the Court they have looked and there
2 are no additional emails that would potentially be
3 responsive under RCM 914.

4 MR. COOMBS: That is correct, Your Honor.
5 And the Government, as officers of the Court has said
6 the same, no emails that they would turn over to the
7 Defense.

8 THE COURT: So the Court see no additional
9 Janxt issues at this point.

10 The parties have filed, the Defense has
11 four separate motions for findings for the Court to
12 enter findings of Not Guilty that were addressed
13 earlier.

14 One of those motions -- two of those
15 motions actually involve the offenses under 18 Code
16 Section 641 and Article 134, which are basically the
17 stealing from one and knowingly convert offenses.

18 And there were two footnotes in the
19 Defense's filing and that apply that talked about, if
20 the Court was to rule a particular way the Defense
21 requested additional filings that they would like to

1 file.

2 I advised the parties that I would like
3 to consider the RCM 917 motion with all of the evidence
4 and all of the parties positions before me at one time.

5 So the procedure that we have worked out
6 is, the Defense, by the end of today, is going to file
7 an email outlining their position with respect to the
8 additional issues, as well as the case authority that
9 they are relying on.

10 And then the Government has until close
11 of business tomorrow to file any response to that
12 motion. And we will orally argue that motion on
13 Thursday in the morning when we begin.

14 The Court will be prepared to rule on
15 the RCM 917 motions with respect to the aiding the
16 enemy offense and the computer fraud, the specification
17 in Charge one, specifications 13 of Charge 2 will be
18 prepared to answer that ruling on the Thursday session.

19 Is there anything else we need to
20 address before we proceed with the oral argument on
21 those motions? Note for the record the Defense

1 requested oral argument on all of their 917 motions.

2 MR. COOMBS: Yes, Your Honor. Your Honor,
3 what I would like to do is talk about the Defense's
4 view on the 1030, 917, not so much tracking the motion
5 that we filed, but just our view why the 917 should be
6 granted.

7 Backtracking slightly, to talk about the
8 historical nature of the many filings that we filed on
9 1030. This would be the third motion to dismiss it.
10 Here's hoping third time is a charm.

11 I would like to start off with just
12 talking about the first time that we filed. When we
13 first filed the motion, the issue was over whether or
14 not U.S. v John, U.S. v Rodriquez line of cases, the
15 Court follow kind broad view of how 1030 is viewed or
16 the narrow view, which is U.S. v. Nosal.

17 And in that motion hearing what came out
18 of that was, the Court determined it would follow the
19 narrow version of U.S. v. Nosal. And specifically what
20 the Court said was that the term exceeds authorized
21 access is limited to violations of restrictions on

1 access to information, not restrictions on its use.

2 At that time the Government avoided a
3 dismissal based upon its representation that it did
4 intend to prove a violation of restriction on access,
5 an accessed based restriction.

6 The theory of the Government kind of
7 shifted at that point from embracing the broad view of
8 John and Rodriguez to going to a theory which they said
9 PFC Manning used an unauthorized Wget. And that
10 program circumvented the normal open, click, save
11 process and thus, he bypassed, in the Government's
12 words, a code based restriction by using Wget.

13 When the Government brought that theory,
14 the Defense brought its second motion to dismiss. The
15 Defense's position was, there no code based restriction
16 and this was simply a use authorization restriction, if
17 anything, as opposed to an access restriction.

18 And what came out of that second motion
19 again was, because the Court didn't have the benefit of
20 all the evidence, the Motion to Dismiss was not
21 granted, but importantly the Court talked about the

1 fact that they were other types of restrictions, other
2 than purely code based or technical restrictions, that
3 there could be restrictions that could come from a
4 variety of sources to include regulations, user
5 agreements or command policies.

6 And even though the Court had that
7 position, the Court still maintained that it was
8 following the narrow view of Nosal. And so reconciling
9 the two of those the way Defense views you could have
10 restriction, you could have a code based restriction,
11 and you could have a technical restriction and you
12 could have a restriction on access that is perhaps
13 verbalized or put in written form such that, for an
14 example, if you had authorization to use a particular
15 computer and your employer said to you, you can go to
16 every place on this computer but this area. Your
17 access is restricted.

18 And if the employer put that in verbal
19 or in a written format, that could be, under the
20 Court's ruling an access restriction. That's how the
21 Defense reconciled kind of the Court following the

1 narrow view saying it's not just limited to code and
2 technical base restrictions. You could have access
3 restrictions.

4 Again, there is a, as the Defense puts
5 it in its motion, can be a slippery slope trying to
6 determine what is the difference between use
7 restrictions and access restrictions or use
8 restrictions that the Government is trying to show or
9 trying to use as access restrictions.

10 But, regardless of how you kind of view
11 that, the Government's burden that they still maintain
12 and still had to prove, was that Pfc Manning violated
13 access restriction. And that would be the only way
14 they could prove a 1030 offense.

15 And look at the Government's response
16 motion. What do they say they need to prove. They go
17 through their view of all this motion practice shook
18 out. They end up saying, basically what they believe
19 are saying, all they needed to prove is whether Wget
20 was unauthorized program.

21 That's the extent to which the

1 Government believes its burden for them ends once they
2 prove it's an unauthorized program. Then they have
3 proven their 1030 offense in their view.

4 Well, again, setting aside the fact that
5 we don't believe that evidence has shown that it was an
6 unauthorized program, that the evidence actually showed
7 to the contrary, that people could add or use anything
8 they wanted.

9 And there was confusion between the
10 various individuals and responsibility over what you
11 could and could not do.

12 Let's assume that it wasn't an
13 unauthorized program, that that was not a program you
14 could use on the D6-A machine. Even if you assume
15 that, you have to still prove that the use of that
16 violated or circumvented an access based restriction.

17 Where could you find that? Under
18 Defense's view, for the use base or code base
19 restrictions, you would find that from the testimony of
20 Mr. Weissgarber, or from the testimony of the other
21 Defense witnesses, Colonel Miller, or Sgt. Madaras

1 or -- Government witnesses - Miller, Madaras or Special
2 Agent Shaver.

3 Let's go through those. Mr. Weissgarber
4 from Department of State testified there was no access
5 restrictions on the Net Centric Diplomacy Database. He
6 said there was no restrictions on click, open and save.

7 In fact, what he testified to was, the
8 State Department actually relied upon the receiving
9 agency to put any sort of restrictions on access. And
10 it was the State Department's view that, if you had
11 access to the SIPRnet, then you had access de facto to
12 the Net Centric Diplomacy Database.

13 There was no limitation or what you
14 downloaded, how much you downloaded, what you chose to
15 download. None of that was an access restriction from
16 the Net Centric Diplomacy Database.

17 Now let's look at the unit. Colonel
18 Miller, Sgt. Madaras, now Mr. Madaras, and other
19 Government witnesses talked about the fact that there
20 was no restriction on the manner in which you saved
21 information from the SIPRnet. You didn't have to click

1 open and save. No sort of training or any sort of
2 restriction put out on that this is the only way you
3 can access stuff on the SIPRnet.

4 Tom Cherepko, is who the Government
5 brought to bring in the AUP. First of all, the AUP
6 stands for Authorized Use Policy. So right out of the
7 gate, it looks like it's a use type restriction as
8 opposed to access restriction.

9 But let's assume for the moment maybe
10 there was an access restriction within the AUP. Well,
11 if that were the case, we don't know, because the
12 Government never produced the AUP.

13 Tom Cherepko was called essentially to
14 say, well, the one in 25-2 looks pretty similar to the
15 one I think we signed. But then, even on my cross
16 examination within minutes of viewing the one in 25-2
17 he had to have his memory refreshed as to what the
18 terms were within the one that he did review for the
19 Government just seconds before my cross.

20 So the Government didn't offer any
21 evidence as to an access restriction with an AUP. And

1 there's been no evidence from anyone in the unit that
2 there was any sort of access restriction on how you
3 downloaded information from the SIPRnet. Again,
4 Mr. Weissgarber said from the Net Centric Diplomacy
5 Database there was no access restriction.

6 Now we look at another one of the
7 Government's witness, Special Agent Shaver. He
8 testified about Wget. Importantly, he said Wget was an
9 open source program that was not associated with
10 hacking or anything. But from his expertise what he
11 testified to was that Wget would not give you any
12 greater access than you otherwise didn't already have.

13 It would not enable you to download
14 information that you were not previously authorized to
15 download, would not authorize you to see or view
16 information that you were not previously authorized to
17 see or view. So even from a program standpoint Wget is
18 not designed to exceed authorized access.

19 So really from the Government's position
20 there is absolutely no proof that there was an access
21 restriction. What does the Government point to though?

1 The common refrain is that the use of Wget allowed Pfc
2 Manning to systematically harvest information in a
3 rapid format that he otherwise would not be able to do.

4 So essentially their argument boils down
5 to, because the Wget program did it faster than what he
6 could have done humanly possibly by doing click, open
7 and save, that must have exceeded authorized access.
8 But importantly there's no evidence day to support that
9 position.

10 Again, if Manning wanted to, he could
11 have spent all his time to click, open and save and
12 there could have been no prohibition to that.

13 What this program did, and what Special
14 Agent Shaver said it did, was just automated that
15 process. Sorry. Go ahead, Your Honor.

16 THE COURT: Assume that the evidence shows
17 that Wget is an unauthorized program. Is it the
18 Defense's position by using Wget to access or to become
19 involved with the classified information at issue, the
20 Department of State cables, that that's not an access
21 restriction?

1 MR. COOMBS: No. The idea -- you would be
2 taking, if that were the position, I think that is the
3 Government's position of under the user agreement, the
4 user agreement said I won't use any unauthorized
5 program. We believe it is. The use restriction does
6 not morph its way into an access restriction.

7 What you would have, you would have a
8 violation of Article 92 perhaps. And that would be a
9 violation of 25-2 certainly. But you don't have
10 something that goes from a two year violation to a 10
11 year violation just because you used an unauthorized
12 program.

13 If we take it out, I believe it's a red
14 herring to think about the speed which Wget can pull
15 stuff. Let's just assume that Pfc Manning used a
16 program that went the same speed as click, open and
17 save. He used that program.

18 And then the person right next to him,
19 Specialist Jones, decided I'm going to do the same
20 thing you are doing but I'm just doing click, open and
21 save. At the end of the day they each had 100 cables.

1 One would not be a 1030 -- this one over here a 1030
2 violation and this one over here not, just by the
3 simple fact this person chose to use a program that was
4 not authorized.

5 They both have the same access. It
6 doesn't change the access. What it changes, if at all,
7 is that this person over here committed Article 92
8 violation. This person over here did not.

9 Even in that realm we look at the
10 Government's testimony Greg Weaver was the person from
11 25-2, and we asked him about games, music, video,
12 adding that stuff, is that a problem under 25-2.

13 And he responded, you want the
14 regulation answer or do you want reality? And the
15 reality is, that even though the regulation may say one
16 thing, the deployed unit does something different. And
17 Col. Miller backed that up by saying, well, you know,
18 there's some things that if my S6 came to me, in that
19 case Tom Cherepko, and said, hey, these things are not
20 permitted or not entitled to be done on the net, I
21 might say, well, what's the reason for that? And if I

1 think it's a moral and welfare thing, I'm going to ask
2 up the chain or whatnot to ignore that, to go ahead and
3 allow music to be listened to.

4 And we see that actually being done
5 throughout the T scale and through multiple soldiers
6 saying I added things, newer versions of a particular
7 programs.

8 So if we said like, for example, I think
9 the way the testimony would shake out for Mr. Milliman,
10 that he was the only one authorized to add anything.

11 We heard from Specialist Showman and Mr.
12 Madaras that they had Pfc Manning ad a version of work
13 chat on their computer. Mr. Milliman talked about the
14 fact that --

15 THE COURT: And who?

16 MR. COOMBS: Mr. Madaras. They talked about
17 the fact that approval for a particular version was for
18 that version. So if you added a newer version on your
19 computer of Work Chat, then that would be an
20 unauthorized program.

21 So under the Government's theory then

1 somebody who obtained information through Work Chat on
2 their computer, although standing right next to
3 somebody who is also using Work Chat but an older
4 version, one person committed 1030 the other person is
5 not.

6 And the reason why that can't be is the
7 exact reason Nosal, and all cases that follow it,
8 believe that access restrictions cannot be use
9 restrictions. Access restrictions have to be clear.
10 They actually have to indicate the person is not
11 authorized to do this to get to this information. It
12 isn't the computer that's being punished, the use of
13 the computer, not getting the information.

14 So when you're looking at that, then you
15 have to have a clear access restriction. If the
16 Government was going to make an access restriction
17 based upon using the right type of programs, then it
18 has to be clear, clearly stated somewhere.

19 And there's been no evidence of that
20 anywhere in the Government's case. Other than people
21 saying I don't think Wget, I've never heard of it, I

1 don't think Wget was authorized.

2 THE COURT: What is Defense's position on
3 what AR25-2 says with respect to executable files?

4 MR. COOMBS: When you look at 25-2, both in
5 the provision that deals with executables, doesn't use
6 the term executable. What it uses is like .Exe, bac
7 files and .exe files, ma'am, are executable files.

8 So when you look at 25-2 AUP provision
9 charged by the Government, it doesn't clearly spell out
10 executable files. One important thing in there is it
11 has a caveat to the prohibition. That is without
12 authorization. So these things are not permitted
13 without authorization.

14 And what we have seen in the
15 Government's case, not considering anything from the
16 Defense's, we have seen that there is a difference of
17 opinion what was authorized and what was not.

18 THE COURT: Isn't that a conflict in the
19 evidence which goes to the fact finder?

20 MR. COOMBS: True. That just goes only to
21 issue of whether or not this was an authorized program.

1 Whether or not this was an authorized program, as
2 Defense maintains, doesn't impact at all on whether or
3 not Pfc Manning might have exceeded authorized access.

4 The unauthorized program or not is just
5 a use restriction. Don't use these types of programs.
6 It's a clear use restriction that John and Rodriguez
7 case line might say, hey, you could exceed your
8 authorized access. Any Court following the Nosal line
9 of cases would not. And this Court has indicated it's
10 following the Nosal line of cases.

11 THE COURT: With caveat.

12 MR. COOMBS: With the caveat that you could
13 have something besides a code or a technical base
14 restriction. But that restriction then would have to
15 be that an access restriction that's clearly spelled
16 out. Otherwise, there's no following the Nosal
17 opinion. Because, then that would be the exception
18 that swallows the rule.

19 If any sort of use restriction placed
20 upon the computer, someone could put in an AUP, only
21 use this computer if you kneel down and say a prayer

1 and before you then click anything on the computer. If
2 you fail to do that, you have now exceeded your
3 authorized access -- ten year offense.

4 This Court clearly would not entertain
5 that type of use restriction, nor would any other Court
6 following Nosal. John Rodriguez would. They would say
7 an employer can contract the 10 year violation in the
8 use restriction.

9 So even though the Defense maintains
10 that should be a code or technical based restriction in
11 order to prevent going down that slippery slope, if you
12 are going to go over to, you can have a verbal or
13 written access restriction, then it has to be clear
14 restriction. It can't be you used an unauthorized
15 program.

16 The best example of this is the Douglas
17 case cited by the Defense in its brief. Two things to,
18 I guess to point out about the Douglas Hospital case.
19 First, it's a civil case. And so obviously in a civil
20 case you have fewer concerns about loss of liberty.
21 Even in a civil case, the Judge said, no, this is use

1 restriction that you are trying to turn into an access
2 restriction, but it's not an access restriction.

3 But the second thing is, this case
4 almost is our facts. It is so on point --

5 THE COURT: Does it involve classified
6 information?

7 MR. COOMBS: No. Actually, that was a
8 question by the Court in the Defense's case. We don't
9 believe that makes a difference. The Government's
10 position is, he used an unauthorized program to rapidly
11 harvest what he otherwise was accessed has authorized
12 access to but couldn't do by simple click, open and
13 save.

14 In the Douglas Hospital the idea was you
15 cannot use -- in fact, in their -- they specifically
16 stated that you are not allowed to use or download
17 information in unauthorized storage devices.

18 And in this instance the doctors that
19 were charged for a 1030 had access to the information
20 but they used an external hard drive in order to save a
21 great deal of information that they otherwise could not

1 have downloaded. They downloaded information they were
2 otherwise entitled to access onto an extraordinary and
3 large unauthorized storage device.

4 And Douglas Hospital maintained this is
5 a violation of 1030. And ultimately what the Court
6 said is, of course, the distinction between an employer
7 use restriction and access restriction may sometimes be
8 difficult to discern, since both emanate from a policy
9 decision by the employer about decisions about who
10 should have what degree of access to employer's
11 computer and stored data once given such access to
12 various uses to which an employee may put those
13 computers data stored in them.

14 Simply stating a limitation on access
15 restriction is an access restriction doesn't convert
16 what is otherwise a use policy into an access
17 restriction.

18 And that's exactly what we have here.
19 But we have even a more deficient case than the Douglas
20 Hospital. At least in the Douglas Hospital case they
21 have the AUP to point to and say here's what the person

1 signed.

2 Even in that case the Court said, look,
3 we are going to reject the idea that this use
4 restriction is somehow an access restriction. They
5 were entitled to access it. You never limited that.
6 All you said was on our storage devices, on our
7 computer system, don't use extraordinary large storage
8 devices without previous authorization. Much like in
9 this case, do not use any sort of program without
10 authorization.

11 And whether or not Pfc Manning had
12 authorization is almost irrelevant. The issue now is,
13 does that use restriction turn into an access
14 restriction. And the defense maintains it does not.

15 In fact, no criminal case that has
16 adopted the narrow view of Nosal --

17 THE COURT: How many have?

18 MR. COOMBS: I'm not for sure -- I'm good but
19 not that good. I mean --

20 THE COURT: Ballpark -- a lot, a little?

21 MR. COOMBS: It is about a split even. The

1 4th Circuit, when Nosal 1 came out and Nosal 1 was more
2 along kind of a John Rodriguez, the 4th Circuit
3 disagreed and then Nosal embank reconsidered.

4 It's still kind of a split area. I
5 think -- the fundamental underpinnings to the 1030
6 concern is notice. And I think that is where everyone
7 can kind of agree that a person that is using a
8 computer should have some sort of notice that now they
9 are potentially facing a 10 year offense.

10 And if there's simple use restrictions
11 that are put into, usually like 10-15 page documents,
12 that I'm ashamed to say as an attorney, I probably
13 don't read before I sign. Certainly soldiers don't
14 read these things clearly before they sign.

15 And yet when they sign them, every one
16 use restrictions -- some of them as you will not use
17 the computer unless you have updated virus protection
18 installed. You will not use this computer unless you
19 have completed your, all required training.

20 These are some of the minor things that
21 are in the AUP that under the Government's argument a

1 violation of that, if I were using my computer and
2 didn't get my virus protection consistent with AUP, I
3 just committed a 10 year offense.

4 That's what the Drew case was concerned
5 about. And that's what many of the cases that followed
6 Nosal --

7 THE COURT: Didn't Drew involve a lesser
8 included offense?

9 MR. COOMBS: It did. The main concern
10 initially was the idea that you couldn't premise the
11 greater, 1030 offense that was initially at issue on
12 the idea that there is no notice in this instance.
13 That was the Constitutional concern.

14 But when you look at the end of the day
15 the Government's proof, even if we accept that the
16 program used by Pfc Manning was unauthorized. Let's
17 even go so far as to accept that it was unauthorized
18 and that's exactly, and he knew it, no one gave him
19 permission, and he used that to download the cables.

20 The Government has not proven at all an
21 access restriction. They kind of want to jump from

1 Point A to Point C without doing Point B. And B would
2 be, okay -- was it a code or technical based
3 restriction? No. All right. This Court will look to
4 AUP or perhaps a regulation or some other command
5 policy. Do you have one of those things to show me?
6 No.

7 There's nothing in the middle there to
8 say that this was an access restriction. What they can
9 show you is that it may be an unauthorized program.
10 And that again is an Article 92.

11 THE COURT: Whether it's an access
12 restriction, isn't that a question of fact for the fact
13 finder?

14 MR. COOMBS: Well, the access restriction, I
15 guess whether or not there's some evidence of it, yes.
16 If there is no evidence, the Defense's position is
17 there has been none, then even if you are the fact
18 finder, your Judge's role now, that's where the 917
19 should be granted.

20 THE COURT: So you do agree the Court is
21 acting basically in two different roles. In 917 I'm

1 acting under the standard of the rule and as a fact
2 finder I'm finding beyond a reasonable doubt.

3 MR. COOMBS: Exactly, Your Honor. So it
4 could be a situation where because of just how low the
5 bar is for 917, the Government gets over that hurdle
6 but then has not proven beyond a reasonable doubt.

7 Even if this instance they have gotten
8 over the hurdle because there's been no evidence.
9 There is nothing that they have offered the Court to
10 say that this was an access restriction. No witness
11 has testified to that.

12 And, in fact, all the witnesses from the
13 Government have testified to the contrary. And the
14 most important of which would be Mr. Weissgarber who
15 would know about access restriction because he's the
16 person they brought to talk about the Net Centric
17 Diplomacy Database. Or you have somebody, the other
18 person that would be their star witness, Captain
19 Cherepko. And, unfortunately they couldn't produce an
20 AUP.

21 But even if they did produce the AUP,

1 and even if we followed the AUP within 25-2, there's no
2 access restriction limitation laid out in 25-2.

3 So, unless the Defense wasn't correctly
4 understanding the first ruling and the second ruling by
5 the Court, you know, the Defense believe they are
6 narrow view or Nosal with the proviso that you could
7 have these access restrictions in other places. You
8 got to have evidence of that.

9 THE COURT: All right. Thank you.

10 MR. COOMBS: Thank you, Your Honor.

11 THE COURT: Captain Morrow.

12 CAPTAIN MORROW: This is admittedly a case of
13 first impression. And I would like --

14 THE COURT: Before you get there, let me ask
15 you a question. Is the Government aware -- I probably
16 should have asked Defense this -- either party aware of
17 any other 738 case involving classified information?

18 CAPTAIN MORROW: No, Your Honor.

19 MR. COOMBS: Yeah, there is one. Drawing a
20 blank. I can look through my notes.

21 THE COURT: Thank you.

1 CAPTAIN MORROW: And to begin, Your Honor,
2 draw the Court's attention to its ruling on the renewed
3 motion. So the second motion by the Defense to dismiss
4 Specification 13 and 14. This was titled the
5 Government's brief on this issue, but it bears
6 repeating.

7 (Reading)

8 In this case, Your Honor, the
9 Government's contention which, aside from the initial
10 ruling that the Court would adopt the, those outline of
11 cases versus the John Rodriguez cases is that the
12 restriction was restriction on the manner of access to
13 this. And we proffered a theory.

14 THE COURT: What is the Government's theory?

15 CAPTAIN MORROW: The accused obtained the
16 cables using an unauthorized program Wget. The theory
17 was clearly laid out in the brief on the subject.

18 THE COURT: Did he access the cables using
19 Wget or did he already have access to the cables and
20 used Wget to download them?

21 CAPTAIN MORROW: Say that again.

1 THE COURT: Did he use Wget to access the
2 cables or did he have access to the cables and use Wget
3 to download --

4 CAPTAIN MORROW: Wget -- it didn't bypass
5 some firewall or something between him and the cables.
6 But Wget was the method of obtaining all the cables.
7 And the Government -- Defense cites Mr. Weiss Carter's
8 testimony for the proposition there was no access
9 restriction.

10 And the Defense made a point with pretty
11 much every Government witness to essentially play a
12 game of gotcha with the word access.

13 It's not as simple as that. As the
14 Court noted in second ruling on this subject, access
15 and use are not mutually exclusive. When we say
16 Acceptable Use Policy, we are not talking use of the
17 information, as that's potentially, time use,
18 Government now claiming relying on prohibition of the
19 use of the information.

20 AUP refers to use of the computer. It's
21 never as simple as, just they in this manner, in this

1 way, he could go to the website, quick on cable,
2 download that cable and he could use that cable
3 forever. The Government is not -- we have stepped away
4 from the theory, the use theory, as the Court
5 instructed. The Court was not going to go down that
6 road.

7 But the Government has offered another
8 theory consistent with Nosal, which is the most
9 stringent or most restrictive case on the subject that
10 included the holding that restriction of access can
11 include the manner of access to the information.

12 THE COURT: What is the Government's position
13 on whether Wget was authorized or not?

14 CAPTAIN MORROW: That it was absolutely
15 unauthorized.

16 THE COURT: And there is no conflict in the
17 testimony?

18 CAPTAIN MORROW: When you parse it out, we
19 didn't see conflict. The Government's position is what
20 the Defense has cited is conflict. There were music,
21 people using music and games or that people used Work

1 Chat, in the Defense's words red herrings.

2 We are not talking about music, movies
3 and games. The Defense in those cases, colorful
4 argument that, if we were charging Pfc Manning with the
5 loading of unauthorized music on his computer, then we
6 would have a problem because it appears that the
7 command had unwritten policy that it was okay to listen
8 to music on your computer.

9 THE COURT: What is the difference and where
10 is the evidence the Government presented between Wget
11 and a music file? Are they executable files or are
12 they different in some respect other than one plays
13 music and the other doesn't.

14 CAPTAIN MORROW: Well, the different between
15 executables and software is also red herring. Special
16 Agent Shaver clearly testified they are one in the
17 same.

18 THE COURT: What does AR25-2 prohibit.

19 CAPTAIN MORROW: That prohibits executable
20 software, freeware, which is something you might get
21 off the internet in programs. I would have to go back

1 and look specifically at the provisions of 25-2. I
2 believe that's what how it's articulated.

3 Additionally, Your Honor --

4 THE COURT: If AR27-2 prohibits executable
5 files in programs, and there is evidence that
6 executable files in programs are routinely allowed in
7 by the unit on the D6A computer, what is the difference
8 between a song and Wget?

9 CAPTAIN MORROW: Well, Your Honor, music is
10 not an executable file. I'm not sure --

11 THE COURT: How about movies.

12 CAPTAIN MORROW: I don't believe movies are
13 an executable file either.

14 THE COURT: Where is the evidence we heard of
15 that?

16 CAPTAIN MORROW: I would have to get back to
17 you on that.

18 THE COURT: Okay.

19 CAPTAIN MORROW: Again, the distinction, if
20 there was, in fact, a command policy essentially
21 because they were in a deployed environment and Col.

1 Miller specifically stated, hey, I want people to be,
2 you know, to use whatever is within their possession to
3 remain vigilant and interested in the work. If one of
4 those things was listening to music while doing their
5 work, that didn't seem to be something that he had a
6 problem with.

7 Again, that's different than an
8 executable file that several witnesses testified about
9 what Wget actually does, including Chief Rearrd,
10 Special Agent Shaver, Mr. Weaver, Captain Cherepko and
11 they all articulated reasons why it would be entirely
12 appropriate to treat Wget differently than every other
13 file, program or piece of software that has come up in
14 this case.

15 THE COURT: What were those reasons?

16 CAPTAIN MORROW: I refer you to the
17 Government's brief on this case, Your Honor. But I'll
18 just highlight it here. (Reading)

19 THE COURT: What difference does that make?

20 CAPTAIN MORROW: When it downloads
21 information faster. I believe it makes a difference on

1 the SIPRnet, Your Honor. Sort of why we are here
2 today.

3 THE COURT: Well, what about the testimony we
4 heard earlier that it was -- computers crashed and it
5 was perfectly fine to download on classified CDs and
6 SCIF.

7 CAPTAIN MORROW: Your Honor, that's a theory
8 put forth by the Defense. I don't believe there's any
9 evidence that people were using CDs as back-up systems.
10 That was something raised. I don't believe anyone else
11 said they used -- put their entire computer on a CD to
12 back it up.

13 THE COURT: I don't think anyone said that
14 either. Was there not testimony there was no
15 prohibition about downloading on CDs, as long as they
16 SCIF and properly worked?

17 CAPTAIN MORROW: No prohibition. The reason
18 for downloading CDs was to for foreign -- to burn
19 information to CDs in order to release classified
20 information to their Iraqi counterparts. Classified
21 information that was releasable to Irawis, that had

1 been embedded from the, in the system down from the
2 division level to the brigade.

3 That was a specific reason why --
4 obviously I'm sure that in the SCIF, if you have a file
5 and need to burn classified information work to another
6 analyst, S2, there's nothing specifically prohibiting
7 that.

8 THE COURT: Could Wget be beneficial, if you
9 had to download for an official reason?

10 CAPTAIN MORROW: Well, there was testimony it
11 was course of this case, and I believe Special Agent --
12 I don't want to get to what he would say. He used it
13 because he was trying to replicate the process by which
14 Pfc Manning did something.

15 And again, that is sort of consistent
16 with what Chief Rearrd said about -- he uses it as, you
17 know, in the course of his work as somebody who is
18 doing penetration testing, attacking the army network,
19 not necessarily using for all the reasons that might be
20 useful in other context.

21 With respect to the Douglas case, Your

1 Honor, just one piece of that. I believe that case
2 isn't addressing the manner of access or manner of
3 retainment. It addresses the storage of the
4 information.

5 Which is, again, the Court specifically,
6 they determined under those facts that was a
7 prohibition of use information, not the manner in which
8 they obtained the information.

9 THE COURT: What is the different between
10 that case and this case, other than a civil case not
11 involving classified information. What's the
12 Government's argument as to why I cannot draw the same
13 distinction?

14 CAPTAIN MORROW: That case involves the
15 storage of information. It wasn't the method of
16 obtaining the information. Or accessing the
17 information. It was the method of storing the
18 information.

19 THE COURT: Back to my original question.
20 The accused used Wget to access the cables or did he
21 already have access to them and use Wget to pull them

1 out?

2 CAPTAIN MORROW: He did use Wget to access
3 the information. Because he ran it from his desktop.
4 A program that was run from his desktop. It was under
5 his user name, bradley.manning, and it went out onto
6 the SIPRnet and grabbed the information.

7 The Government wouldn't contend that
8 there was any firewall that Wget or that Wget
9 circumvented. Nor does the case law require that.

10 THE COURT: Your counterpart just stood up.

11 MR. FEIN: Could I have a moment, Your Honor?

12 THE COURT: Yes. That would be Major Fein
13 for the record.

14 (Pause)

15 CAPTAIN MORROW: There wasn't a method for
16 downloading cables in batch for the NC website in
17 batch.

18 THE COURT: The evidence has shown there is
19 not a procedure?

20 CAPTAIN MORROW: There wasn't a procedure.
21 There wasn't any other mechanism which to download

1 cables in bulk like there was, for example, in the
2 Defense's motion in the CD database there was a method
3 to download significant activity reports in batches.
4 Monthly batches once export all SigActs to an Excel
5 file.

6 That was a method that was something
7 that was in the system that allowed that sort of bulk
8 downloading. There was not a comparable method of
9 obtaining a large number of cables from the NCE system.

10 THE COURT: Was there a prohibition for bulk
11 downloading?

12 CAPTAIN MORROW: Explicit prohibition?

13 THE COURT: Yes.

14 CAPTAIN MORROW: No. But Government will
15 argue that by virtue of the lack of a design feature in
16 that is an implicit prohibition.

17 THE COURT: What is the Government's view of
18 Wget, what kind of a program executable with whatever
19 software it is, and how it got on Pfc Manning's
20 computer and where it was?

21 CAPTAIN MORROW: The evidence has shown that

1 the program was on his desktop under his user profile.
2 It was not run from a CD. It was under his user name,
3 bradley.manning both times, when he downloaded it,
4 May 4th or May 3rd, and moved it to his SIPRnet
5 computer, it was on his desktop or under his program,
6 under his profile.

7 And again when it was running in the
8 March timeframe it was running, the evidence showed
9 that it was in the pre-fetch files, which is
10 essentially under his user name or his profile.

11 THE COURT: And I find that evidence where?

12 CAPTAIN MORROW: The testimony of Specialist
13 Shaver.

14 THE COURT: Am I understanding the
15 Government's position correctly, that was Wget was
16 program -- was it introduced?

17 CAPTAIN MORROW: Introduced onto his computer
18 in both occasions.

19 THE COURT: How?

20 CAPTAIN MORROW: It was downloaded both times
21 from the NIPRnet, put onto a CD and moved over to is

1 SIPRnet computer.

2 If you recall, Special Agent Shaver, the
3 second time we can show essentially the time it was
4 downloaded on the NIPRnet computer, remember he was
5 talking about the NIPRnet computer and the internet
6 explorer. He said I can see my best line I know it was
7 downloaded. He then he, saw it NIPRnet computer and
8 then saw it appear under bradley.manning profile I
9 believe minutes or an hour later or so. He knows it's
10 the same file cause of the hatch --

11 THE COURT: What, if any, distinction does
12 the Government see in running a program or an
13 executable file from a CD and running it from a user
14 profile?

15 CAPTAIN MORROW: In this case, Your Honor, I
16 don't think there's a distinction for purposes of 1030.
17 There may be a distinction with respect to the
18 specifications in Charge 3 that allege introducing
19 software on the computer.

20 THE COURT: With respect to authorized versus
21 unauthorized?

1 CAPTAIN MORROW: Whether it was authorized to
2 run from a CD?

3 THE COURT: Yes.

4 CAPTAIN MORROW: That's part of our
5 contention. That was not what was authorized.

6 THE COURT: Okay.

7 CAPTAIN MORROW: Subject to your questions.

8 THE COURT: I have one more. Assume that the
9 Defense, Mr. Milliman and the other people involved
10 with the D6 computers say these kinds of programs are
11 not authorized. And the person's chain of command
12 either says, yes, they are, or I suppose tolerates them
13 being on the machines despite the D6Aprohibition. Are
14 those programs authorized or not authorized?

15 CAPTAIN MORROW: Our position, Your Honor, in
16 the case of the D6A computers, which were owned by,
17 theater owned equipment, not owned by the unit, that
18 the Mr. Milliman's authority would control.

19 THE COURT: And that would be true for junior
20 soldiers notice it was authorized or not authorized or
21 does that make any difference?

1 CAPTAIN MORROW: I don't believe it makes a
2 difference. Several witnesses testified that everyone
3 knew Mr. Milliman was the guy to approach for anything
4 having to do with the D6A computers. He was your man.
5 He was the field FSE, Field Support Engineer, I
6 believe.

7 THE COURT: Thank you. Those are all my
8 questions.

9 Captain Morrow one more. What is the
10 relevance of the Department of State banner?

11 CAPTAIN MORROW: To clarify some evidence
12 that had come in where it talked about how it wasn't
13 access -- it wasn't a banner that related to the use of
14 the information. Government merely points out that was
15 a mischaracterization evidence by accused or by the
16 Defense. The use in that banner refers to use of the
17 system itself, not use of the information.

18 THE COURT: Thank you. Mr. Coombs.

19 MR. COOMBS: Yes, your Honor. Just based
20 upon the Trial Counsel's statement, just a couple of
21 issues. Douglas was a matter of access case. Because

1 the manner of access was, access of these materials
2 with the external hard drive. That's how they accessed
3 the material. So it's a manner of access case.

4 Music is a violation of 20-2, as well on
5 a computer system, as well as movies and games. We did
6 have witness testimony about the dangers of that from
7 his position and that being either the music or games
8 could have a virus contained within them that would
9 make the system susceptible to infiltration.

10 The Government talks about the
11 limitations of the database, as far as kind programming
12 limitations I guess of, in their view it didn't have a
13 batch or a type function. The limitations of a
14 particular program do not intel the access restrictions
15 of that program.

16 We see that all the time when you use
17 one program on your computer to accentuate such as
18 probably an easy example would be Word. Word doesn't
19 have the ability to Pdf a document, but Pdf has the
20 ability to grab a Word document and Pdf it.

21 So just because a particular program

1 might not have a particular feature to it, does not
2 indicate, without more, that's an access restriction.

3 With regards to the banner, you know, we
4 covered the banner. I didn't put Mr. Weissgarber on
5 the spot, anything in that banner indicate access
6 restrictions. And he said, no.

7 So our position, we are not concerned
8 about use restrictions. We are concerned about access
9 restrictions for the purpose of 1030.

10 So he indicated that there were no
11 access restrictions on the Net Centric Diplomacy
12 Database. That instead they relied on their receiving
13 agency to place any sort of restrictions. So if you
14 had access to SIPRnet, you had access to the Net
15 Centric Diplomacy Database.

16 With regard to how the Wget was on Pfc
17 Manning's computer, I think Trial Counsel cleared that
18 had to be from a CD. We heard testimony you could run
19 an executable from a CD, or you could put a shortcut on
20 your desktop. And the shortcut on the desktop could be
21 the program.

1 THE COURT: The CD was still have to be in
2 place.

3 MR. COOMBS: I think there might be a hybrid
4 of three ways. You could have it -- you have the
5 executable program that you can put on your desktop.
6 You are not adding it to the baseline programs.

7 We heard testimony that you would have
8 to added privileges to do that. But for your user
9 profile you could save things to your desktop. So you
10 could put it on your desktop, if you wanted.

11 You could put a shortcut on your desktop
12 that would link to the CD. So, if you had it in your
13 CD and you clicked the shortcut, it would just run it.
14 Or, if you didn't have a shortcut, is open on your
15 computer, my computer, and then see the CD drive,
16 double click that and then double click the executable.

17 I think there may be three ways one
18 could run an executable. From the Defense's position
19 there isn't any distinction between the three. They
20 are all run the same way.

21 THE COURT: And that includes transferring

1 from the CD to your user profile?

2 MR. COOMBS: Yes, Your Honor.

3 THE COURT: Was there evidence there were
4 admin rights required for that?

5 MR. COOMBS: No. But you couldn't add
6 programs, as far as to the baseline package of the
7 computer. That's why the Government makes it a point
8 that it's on its user profile, but another user of that
9 same computer couldn't see it. It wasn't part of the
10 main program. It was only on Pfc Manning's user
11 profile. If that's somehow nefarious. You didn't have
12 the ability to add it to the baseline programs where
13 other user could see it.

14 It's kind of like, if we had multiple
15 users on your computer, ma'am, each with a password,
16 you saved it to word document, user profile, I can't
17 see it when I login. I just don't see -- although the
18 Government made an issue, I don't see it as an issue.

19 Then, finally Mr. Milliman testified
20 that he did, in fact, see things on the D6A computers
21 that weren't supposed to be there. And he testified

1 that he couldn't order soldiers to take it off because
2 they didn't need work for him.

3 So this is this kind of pull/push on who
4 actually has the final say on the computers. Mr.
5 Milliman talked about the fact that initially units
6 thought the computers were theirs, they would try to
7 track the password. He would have school them up,
8 these are not computers. And then ultimately he would
9 sometimes see stuff but he couldn't order his soldier
10 to take it off.

11 He was the final say for putting
12 programs on. If he can't -- he was the initial person
13 they had to go to. If he didn't have the authorization
14 or didn't know, then he would go up the chain in order
15 to get authorization.

16 So subject to your questions, Ma'am.

17 THE COURT: Does the Government have any
18 clarifications?

19 CAPTAIN MORROW: I don't believe any evidence
20 was introduced in the Government's case in chief
21 relating to the running of CD.

1 MR. COOMBS: Cherepko. I could double check.
2 I believe Cherepko talked about the ways in which an
3 executable file could be run.

4 THE COURT: Let me ask you, Government, once
5 again. What the Defense described three ways that a
6 program -- an understanding with the evidence
7 correctly, parties are arguing if a program had to be
8 installed on the portion of the computer that was
9 accessible to everyone there had to be administrative
10 rights.

11 Now what about a program added to your
12 own user profile?

13 CAPTAIN MORROW: Didn't have to be
14 administrative rights. The reason that was point out
15 in the Government's brief was that indicates that Pfc
16 Manning nor anyone else approached the administrator to
17 put this under, make this program, apparently very
18 useful program, accessible to everyone who could use
19 the computer.

20 THE COURT: Was there evidence presented that
21 soldiers had to do that? You had to go through Mr.

1 Milliman to get a program installed on the D68
2 computers that would accessible to everyone. However,
3 this were -- what is the Government view of the
4 evidence to add a program, be it Wget or anything else,
5 to your user profile, what, if any, technical
6 restrictions were there in doing that?

7 CAPTAIN MORROW: To write a program like
8 Wget, executable file, could be added -- I believe not
9 every executable file necessarily can be done this way.
10 At least with respect to Wget, it could be added to the
11 computer without having administrator privileges.

12 THE COURT: Did Mr. Milliman or anyone else
13 testify that, yes, you have to go through D6A personnel
14 to add programs to the overall general group? What
15 about programs to your own individual user profile.

16 CAPTAIN MORROW: I don't think there's a
17 distinction there. It's introducing be it software,
18 executable, whatever, introducing something to the D6A
19 machine. That's the inquiry.

20 THE COURT: I don't want to get too far
21 afield here, but if the administrator privileges are

1 required to install something on the general overall
2 computer, was there some reason they weren't required
3 to install programs on user profiles?

4 CAPTAIN MORROW: I'm sorry. Say that again.

5 THE COURT: Again, I don't want to get too
6 far afield here. To install something on the T drive
7 or something that is accessible to all of the members
8 of the unit, require administrator privileges, why was
9 there a technical restriction then to adding programs
10 to user profiles?

11 CAPTAIN MORROW: I don't believe there was
12 administrator -- T drive is essentially a share drive.
13 Any file could be added by anyone to the T drive.

14 THE COURT: How would you add one then that
15 could be used by everybody, one that required
16 administrator rights?

17 CAPTAIN MORROW: Well, it depends how the
18 program operates, whether it operates as an executable
19 or essentially a traditional program, which would have
20 to be installed on the computer. Installation of
21 something like that requires the administrator

1 privileges. It operates with the operates with the
2 system in a way that executables don't.

3 I'll just defer to Major Fein. He knows
4 more about computers.

5 MR. FEIN: Ma'am, the testimony this Court
6 has heard is first from Special Agent Shaver, who
7 distinguished the difference between a regular program
8 that installs on a computer. He said there's, his term
9 libraries, and those libraries install all users to
10 use. You have to have administrator access for that.

11 You also heard testimony from Special
12 Agent Shaver that said a self-executable is
13 self-contained file that has all that information
14 contained within it. And it could be run from any
15 location to where its put on CD, could be, or as the
16 Defense witness did testify about and then on a user
17 profile.

18 To answer your original question, you
19 said what restriction physical limitation would there
20 be for an individual who doesn't have administrator
21 rights.

1 You heard from Mr. Weaver, his testimony
2 was, it is impossible to come up with a policy, both on
3 a computer itself and a policy within Army regulation
4 that captures every possible scenario of installing
5 every type of file from a Word document to a .exe. It
6 takes individual responsibility of following the rules
7 and not installing programs.

8 What everyone has testified about is
9 that Wget was a program, self-executable program. And
10 then from Sergeant Shaver's testimony it was found on
11 his desktop.

12 So that could be, the word install
13 really what that means, moved. The file was located on
14 his desktop and because Shaver's testimony was
15 self-contained single file, it is Wget.exe -- one file
16 that can moved.

17 So an individual is restricted, this is
18 what Mr. Weaver testified about, an individual is
19 prohibited to introduce software that they are not
20 authorized to introduce. That's what Mr. Weaver
21 testified about. There's no technical restriction. It

1 is still a violation of the regulation to introduce a
2 program.

3 THE COURT: What is the difference between
4 introducing Wget and introducing a movie?

5 MAJOR FEIN: First off, a movie is not a
6 program. The Defense has presented no evidence, and
7 there is no evidence that a movie is an executable or
8 that a video, music are executables.

9 What you did hear testimony on is that
10 there was program called DLC, a movie, music a player
11 to play movies and music.

12 So movies and music are not executables.
13 Wget was. That's in the testimony Special Agent
14 Shaver, Chief Rearrd and others.

15 THE COURT: A data DLC, is that something a
16 soldier can introduce through either CD on put on his
17 user profile without administrative rights?

18 MAJOR FEIN: Ma'am, I could answer that
19 question, but there has been no evidence presented in
20 this Court 917 that answers that.

21 THE COURT: No witness testified about that

1 issue?

2 MAJOR FEIN: Correct. But if Court would
3 like an answer, I can answer that.

4 THE COURT: I'm basing what I have based on
5 the evidence. So, no.

6 MAJOR FEIN: That is not necessarily been
7 answered. There was testimony in the Defense's case
8 about what was on CD. That is not for purposes of 917.
9 What was testified about was DLC is a movie player,
10 movies and music player. And those are not programs.

11 THE COURT: Okay. Thank you. Is that your
12 motion? Any final words?

13 MR. COOMBS: Yes, Your Honor. With regards
14 to the idea of explicit or implicit prohibition for
15 adding shortcuts or adding programs. The explicit
16 prohibition, that kind of goes back to Defense's entire
17 position on this, that the Government hasn't,
18 regardless of how you view Wget, the Government hasn't
19 offered any sort of access restriction, evidence of the
20 access restriction for the cables in this instance.

21 What they relied upon is, well, you

1 should know if you are using a not authorized program
2 that's an implicit access restriction. Here that goes
3 again back to the Nosal line of cases that, if you're
4 going to premise your defense on something, the notice
5 requirements are that you need to inform the individual
6 of the access restrictions but what they are not
7 allowed to do or go to.

8 In this case regardless of whether or
9 not it's an unauthorized program or not, it was not an
10 access restriction for the Net Centric Diplomacy
11 Database. So really the last bit of the Government's
12 argument is going to be relevant to the Article 92
13 offenses, as opposed to the offenses regarding 1030.

14 We do have evidence of executables being
15 put on the desktop other than Wget. That's Work Chat.
16 Those executables by Specialist Showman and Sergeant
17 Madaras say the person that put it on their computer is
18 Pfc Manning, a newer version of that without Mr.
19 Milliman.

20 Then we again have evidence of Mr.
21 Milliman saying that, look, I saw stuff that was

1 unauthorized, but I was not in position to tell the
2 soldiers what to do because they didn't work for me.

3 So even though Mr. Milliman might have
4 been the civilian contractor that owned the computers,
5 his testimony was that, yeah, I controlled what was put
6 on from a program standpoint, but I couldn't control
7 what soldiers put on their desktop.

8 And that's where Captain Cherepko's
9 testimony seeing different things on the T drive and
10 apparently another soldier's computers where he was
11 advising the brigade command, look, we have
12 unauthorized media on our T drive and soldiers put on
13 their computers that's information assurance problem.

14 And according to Cherepko that problem
15 was never was addressed or remedied until the moment
16 they unplugged from the system.

17 THE COURT: So movies and music, do you agree
18 with the Government, they are not executable files?

19 MR. COOMBS: I don't profess to be a computer
20 expert.

21 THE COURT: Did the evidence show?

1 MR. COOMBS: I believe, you know, the idea of
2 executable, depends how you view executable. EXE would
3 be a typical executable file. Movie file might have an
4 ending like WMD, based on the type of player that would
5 play it.

6 But if the idea and the evidence has
7 been executable file is something that you double click
8 and run, if that is the definition the Court goes with
9 on executable file, based upon the evidence, then music
10 and movies and games are executable files. Captain
11 Cherepko did say that games were executable files.

12 But anything that you double click and
13 it runs, like music, movie, like a game, is executable.

14 THE COURT: One last question. I don't
15 remember -- I asked the Government this. Wget at what
16 stage of the process did the evidence come out that --
17 is that a program used to access Department of State
18 files or do you already have access to Department of
19 State files and Wget then goes to retrieve them?

20 MR. COOMBS: Your Honor, I don't think the
21 Government offered any evidence on that. As to -- at

1 what stage does Wget get involved? Do you have to be
2 on the Net Centric database and say Wget run and get
3 all this stuff? Or can you be just on your computer,
4 then having not gone to the necessary database and
5 somehow point Wget to the Net Centric Diplomacy
6 Database.

7 No evidence on that. But the issue, I
8 guess, would be to resolve the question, Special Agent
9 Shaver's testimony that Wget would not give you any
10 greater access to anything that you didn't already have
11 access to.

12 So whether you could somehow point Wget
13 to the database and say go grab all this, when you
14 haven't gone to the database, or going to the database
15 and say Wget get everything you see. According to
16 Agent Shaver's testimony that would make a difference.
17 Wget does not give you greater access to anything you
18 don't already have access to.

19 The answer to the Court's question would
20 be, he already had access. And they used Wget to
21 download it.

1 THE COURT: All right. Before we proceed to
2 the Article 104 Defense Motion for 917, would the
3 parties like a brief recess?

4 MR. COOMBS: Yes, Your Honor. Ten minutes
5 would be fine.

6 THE COURT: Court is recess until 1640 or
7 4:40.

8 (Brief Recess)

9 THE COURT: Proceed with Article 104
10 argument.

11 MR. COOMBS: Your Honor, on 1 March, 2011,
12 the Government referred charges against Pfc Manning.
13 And one of those charges was specification charge one
14 104 offense.

15 From that day forward Pfc Manning has
16 been under the pressure, one time was a referral, now
17 offense possibility of life without parole. The
18 Government has avoided previous attempt to have this
19 charge dismissed under the promise that they had
20 evidence to show and prove actual knowledge.

21 Well, the Government doesn't have any

1 such evidence. They didn't offer any evidence to the
2 Court in their case in chief. Instead the Government
3 has nothing, but perhaps an argument that Pfc Manning
4 might have been negligent in giving information to
5 WikiLeaks. And that the enemy might have been able to
6 access it. But there has been no evidence offered by
7 the Government to show actual knowledge.

8 And this Court has stated in its ruling
9 that, if at trial the Government does not prove that
10 the accused knew by giving intelligence by indirect
11 means, he actually knew he was giving intelligence to
12 the enemy, the Court would entertain appropriate
13 motions.

14 And now at this date is the time which
15 this charge should be dismissed. The Government has
16 not offered anything to this Court that would even
17 approximate closely to, let alone actual knowledge.

18 The Government has introduced certain
19 evidence that they want to say is circumstantial proof
20 of actual knowledge. And they point to his military
21 education and training, and training Pfc Manning might

1 have received both at AIT and while at Fort Drum and
2 then even during deployment.

3 But none of that evidence goes to show
4 actual knowledge that by putting information on the
5 internet, that really all he did, if he did anything,
6 give it to the WikiLeaks, and ultimately goes to the
7 internet, that that single fact alone would mean he
8 would actual knowledge that the enemy would access it.

9 THE COURT: Does the nature of the
10 information make any difference?

11 MR. COOMBS: In this instance for the 104,
12 no. Because the 104 offense just goes with any
13 information. So if it's beneficial to the enemy in a
14 way, so whether it's classified or not does not make a
15 difference.

16 Also in that would be the idea of
17 whether or not it should be classified. That is not an
18 issue for this Court to consider.

19 The only issue is, did he have actual
20 knowledge that by giving this information to WikiLeaks
21 al-Qaida or now al-Qaida of the Arabian Peninsula would

1 get the information, actual knowledge.

2 And the reason why that requirement is
3 important is because the 104 offense is designed to
4 punish those people who are either directly or
5 indirectly trying to get information to the enemy.

6 THE COURT: Well, is that a specific intent
7 offense?

8 MAJOR FEIN: No. When you look at the
9 requirement of the actual knowledge, that's what the
10 104 offense is designed to address, those individuals
11 who are getting information to the enemy.

12 And here the Government has no
13 information to show actual knowledge. And when they
14 have previously argued this point of saying that there
15 would be no difference between giving this information
16 to the New York Times or WikiLeaks, for their purposes
17 they would still be pursuing the same type of offense.
18 Then we can actually take the whole issue of WikiLeaks
19 out of the equation. Because now the sole issue that
20 the Government really is advancing is, if you give
21 information to any news organization that is going to

1 publish that information and put it on the internet,
2 now you have actual knowledge that the enemy is going
3 to gain access to that.

4 And by that sole fact alone, and that
5 sole act alone, you should be facing an Article 104
6 offense, which could carry the death penalty. Article
7 104 demands more than that. And the proof that Article
8 104 demands is that you do have that actual knowledge.
9 Not that you accidentally or negligently put
10 information out that the enemy may gain access to, but
11 that you actually have actual knowledge.

12 And what proof has the Government
13 offered on that? Absolutely none. What they have
14 offered is actually proof to show that he wouldn't have
15 actual knowledge? What is that proof? That's the ASIG
16 document, the 2008 ASIG document, the Army's
17 intelligence report.

18 That report, which -- WikiLeaks.org, an
19 online reference to foreign intelligence terrorist
20 groups, question mark. That's the question mark of
21 that report. And within the report we see that what

1 intelligence gaps they identify is whether or not enemy
2 does go to WikiLeaks. And we know from multiple
3 witnesses during the Government's case in chief, that
4 intelligence gaps are information that we do not know.

5 So what better proof that Pfc Manning
6 would not know than the fact that the United States
7 Army doesn't know whether or not the enemy goes to
8 WikiLeaks. And we list that as intelligence gaps.
9 Something we do not know.

10 And Shelila Glenn, the expert that came
11 to testify about the ASIG report, after bringing her to
12 that question several times, what is a question mark
13 and what would that mean to you, something you don't
14 know, and also asking what intelligence gap is, she
15 finally admitted that is something we don't know.

16 And that report, if Pfc Manning read the
17 report, we have information to show that he looked at
18 it at different times, as far as actually going to it.
19 But reading that report would highlight that we don't
20 know.

21 THE COURT: Well, isn't there also key

1 judgment section that says WikiLeaks.org represents a
2 potential force protection counter-intelligence --

3 MR. COOMBS: When you look at that key
4 judgment section, the important thing there is that
5 within the key judgment it talks about presumed. It
6 must be presumed that they would represent a
7 counter-intelligence or a force protection.

8 This goes back to the negligence issue
9 like we are presuming this would happen. So you must
10 presume that the enemy might go to this information and
11 get access to it. But by the very nature of that
12 presumption, again a presumption is something we don't
13 know for sure to be true or not. We are presuming
14 that.

15 Again that presumption, that term within
16 the key judgment may go to recklessness, may go to
17 negligence, but that is not going towards actual
18 knowledge.

19 The Government failed to show through
20 any of their witnesses, that any witness that they
21 brought forward knew that the enemy went to WikiLeaks.

1 Many of the witnesses didn't know what WikiLeaks was.
2 But this is the Government's case. They need to prove
3 that somebody knew the enemy went to WikiLeaks.

4 They also didn't offer any evidence
5 regarding Pfc Manning and his knowledge, what he knew
6 or didn't know. And that's a key fact here, what did
7 Pfc Manning know?

8 THE COURT: They are offering circumstantial
9 evidence and evidence they have in their brief, right?

10 MR. COOMBS: Yes. They point to
11 Specifications 1 of Charge 2 of knowledge, how you
12 prove knowledge through circumstantial evidence. Well,
13 actual knowledge is something more than the
14 circumstantial evidence. Actual knowledge is showing
15 that the person had actual knowledge. They knew by
16 doing this, this is going to happen.

17 THE COURT: That can't be proven by
18 circumstantial evidence?

19 MR. COOMBS: If you are going to rely upon
20 circumstantial evidence in this, again, without some
21 sort proof of actual knowledge, actually showing that

1 by being told that, reading that or knowing that to be
2 true and doing it again, some sort of proof of actual
3 knowledge would be required by 104.

4 Anything else than that, then what you
5 are doing you are saying he should have known. You
6 know what, he get that training way back in AIT that
7 talked about counter-intelligence and talked about how
8 the enemy has internet too.

9 And, he looked at this report that said,
10 we don't know for sure, it's possible, we might presume
11 it, you know, he talked to other people. He had
12 information on his, in his computer that showed that he
13 was kind of aware of the threat that internet possesses
14 for the United States Government, as far as information
15 being on there, an enemy might get access to it.

16 All that stuff is the slope that Olsen
17 says you don't go down, when it comes to accident
18 inadvertently or negligently. You cannot commit the
19 104 by being negligent. You can commit the 104 by
20 having actual knowledge though.

21 The way we see this is, and the reason

1 why this isn't normally an issue, you see this in 104
2 offenses where the accused has gone directly to
3 somebody that he or she believes is the enemy and is
4 selling information. And it turned out to be
5 undercover or an FBI agent or other law enforcement.

6 Where we catch the individual actually
7 doing that, giving information to the enemy. And with
8 the full knowledge, so the World War II, Korea, and
9 Vietnam type cases where you have individuals who were
10 captured, and they clearly give information to the
11 enemy.

12 Those cases involve a direct giving of
13 information. And this goes back to our earlier 104
14 conversation of, when you're talking indirectly then,
15 then the idea is, then you are achieving indirectly
16 what you could not achieve directly or didn't want to
17 achieve directly for some reason.

18 And when it's indirectly, that's the
19 Government's burden. They have to say, we charged
20 indirectly, Pfc Manning had the ability to send
21 information directly to enemy, if he wanted to. No

1 doubt about that.

2 And he didn't. We are proving that he
3 indirectly did that. Well, does anyone believe Pfc
4 Manning wanted to do that? I know that's not the
5 burden here, but anyone believe he wanted to do that?

6 The Government's own evidence through
7 Andrian Lamo indicated just the opposite, that that was
8 not his intent. That his intent was to get this
9 information out to spark reform, spark debate. That
10 was his intent.

11 So now you have an individual who his
12 intent is to get information out to spark reform to
13 spark debate, to get into a discussion on what we are
14 doing and why we are doing certain things. And the
15 Government is saying, one of those individuals who had
16 access to that information is the enemy. And, in fact,
17 we can show on a later day that the enemy got access to
18 that information, because it's on the internet.

19 Well, again, you have to have more than
20 that. You have to have more than, you were negligent
21 by putting this out and the enemy ultimately got it.

1 Here's your 104 conviction. You have got to have
2 something that shows actual knowledge, that that was --
3 when you put that out, you had actual knowledge you
4 were indirectly giving the information to the enemy.

5 And the reason, again, why this case is
6 different than all others, and this goes across almost
7 all the other charges, the 1030 charges to be sure, the
8 Government has taken a very, very unique position on
9 almost all of its charges.

10 Captain Morrow got up and said this is a
11 first impression type case for the 1030. Well, if
12 Captain Overgaard gets up, she should say the same.
13 This is a case of first impression for the 104 case.
14 No case has ever been prosecuted under this type of
15 theory. That an individual by the nature of giving
16 information to a journalistic organization would then
17 be subject to a 104 offense.

18 THE COURT: Is it the Defense's position that
19 it makes any difference what kind of an organization
20 WikiLeaks is?

21 MR. COOMBS: It does from the standpoint if

1 the Government is trying to vilify WikiLeaks and say
2 because of the nature of giving it to WikiLeaks alone,
3 he should have known that the enemy was going to get
4 it. And the only way they could do that I guess is
5 point to the ASIG document.

6 The idea, especially in this country, of
7 giving information, whether it's classified or not, to
8 the press, because you believe this information should
9 get out to the public, that would certainly put you at
10 jeopardy for a 793 conviction. And perhaps some other
11 convictions. Because you might have violated some
12 nondisclosure agreements or otherwise.

13 But when you're talking about an actual
14 aiding the enemy offense, then there's got to be more
15 than that. And should it make a difference? Yes. The
16 difference should be, you should be showing actual
17 knowledge that the enemy is going to get it. And as
18 you did that, and really the Defense's position, even
19 though I understand Court didn't go as far as we asked
20 for the instructions, but the only way the Defense
21 really believes Article 104 makes sense in this regard

1 to avoid the very slippery slope of basically punishing
2 people for getting information out to the press to
3 basically put a, I guess a hammer down on any whistle
4 blower or anybody who wants to put information out.

5 In order to avoid that, then there
6 should be evidence to show that your intent, there
7 should be an intent requirement, that by using
8 indirectly, if you're going to go indirectly, that your
9 intent was to use that organization to indirectly get
10 it to the enemy. Much like --

11 THE COURT: Whatever should be, are you
12 saying that's how the Court should read the knowledge
13 prong of the law or that the Court should change the
14 law?

15 MR. COOMBS: What the Defense's position is,
16 when we look at actual knowledge, then, when we say
17 could it be proved by circumstantial evidence, the
18 Defense position is, no. You have got to show actual
19 knowledge that by giving it to WikiLeaks, New York
20 Times, Washington Post, whoever, that you had actual
21 knowledge the enemy was going to get it. Otherwise,

1 you are basically just interjecting a negligence
2 standard. And you can't have that.

3 So that evil intent, evil general
4 intent, has to be something. So the Defense's
5 positions is that the evil general intent, that evil
6 general intent has to be, I wanted to use this New York
7 times, Washington Post, WikiLeaks, whoever, to
8 indirectly get it to the enemy because I couldn't on my
9 own.

10 Much like, when you are dealing with
11 individuals who have sold information for profit to
12 people who they either thought were the enemy or were,
13 in fact, the enemy. Or individuals who because they
14 were captured by the enemy during war time, then
15 started to collaborate with the enemy. There is a
16 clear indication of what you are doing. And that's why
17 we can punish you in a 104 with an offense that can
18 take away your life.

19 In this instance what the Government is
20 advancing here today, at least is extremely bad
21 precedent, if what happens is you can give information

1 to who you think is a journalistic organization that
2 would publish it, and by the fact that you should have
3 known that the enemy might eventually get it, you can
4 be punished with 104.

5 And we are going to use circumstantial
6 type evidence to then say, well, you know, you do have
7 some training, you read something that said they
8 potentially might pose a threat, and we don't know for
9 sure if the enemy goes there. And, you know, you were
10 the go-to analyst. So based upon all that, guess what?
11 You get a 104 conviction.

12 THE COURT: What is the Defense's position on
13 the Government's provided evidence that Pfc Manning was
14 a trained intelligence analyst familiar with pattern
15 analysis and using the CIDNE Iraq database to develop
16 that analysis, and knowing the enemy would do the same
17 thing and sending that very database to be published.
18 What is the Defense's view of that circumstantial
19 evidence of knowledge?

20 MR. COOMBS: Yes. I think that's a nice yarn
21 drawn by the Government that doesn't bear out with any

1 of the evidence. The evidence that we have is that we
2 have the SigActs and the witnesses will testify, just
3 using the Government's witnesses, it's an historical
4 document.

5 And whether or not the enemy -- there
6 has been no evidence the enemy has the same intel
7 capabilities as the United States Government with
8 trained analysts who go through SigActs and create work
9 products that within indicate, you know, some sort of
10 trend or whatnot.

11 But what we do have, you have got a
12 SigAct that is capturing the engagement activity with
13 the enemy. So just from a common sense of the
14 evidence, the enemy is fully aware of this. They are
15 fully aware when and how and to what success or
16 non-success of the engagement.

17 Again, that kind of goes back to the
18 negligence aspect of whether or not this is information
19 that ultimately could be used by the enemy. And if we
20 all agree, let's say, yes, it could be, and it was bad
21 information, then that's, again, negligence. You

1 should not have put that out. Because you knew there
2 was a possibility that the enemy would get it.

3 If the Government doesn't have something
4 that evil intent, actual knowledge prong that actually
5 means something, and all they have is, you know, you
6 put this out, you knew the enemy might get it, and they
7 ultimately did, if that's all they need to prove, again
8 when you look at 104, it's not dependent upon
9 classification information or not. Just information.

10 And any soldier who gets up, and the
11 prime example that the Court might be aware of is the
12 soldier talking to then Secretary Rumsfeld, you know,
13 saying to Rumsfeld, hey, look, we are deploying without
14 proper armor, deploying without, you know, the right
15 equipment. And, you know, we don't think we are
16 prepared. And Rumsfeld said, hey, you fight with the
17 army that you got, not the one that you wish.

18 That one fact alone, there were many
19 reporters around who published that and talked about
20 that. That became a story for a while. That fact
21 certainly was information that the enemy could take

1 advantage of.

2 THE COURT: But under your scenario the
3 person would have to be speaking without authority.
4 He's at a town hall meeting and asking questions, how
5 is that without authority?

6 MR. COOMBS: Well, I don't think it would be
7 a without authority issue. If he gets up and he starts
8 talking, he might have authority to answer a question.
9 But certainly doesn't have authority to talk about
10 deficiencies of his unit.

11 And if you take that soldier out and put
12 Pfc Manning in there, and Pfc Manning now says
13 something, you know, hey, you know, and he blurts out a
14 piece of classified information that he thinks the
15 American public should know, with or without authority
16 would not be an issue in that situation. It would
17 still be information that he put out.

18 And you would almost have kind of a ipso
19 facto probably analysis of it of, this is information
20 we didn't want you to put out and so we are going to
21 say you didn't have authority to put that out. And

1 then here's your 104 offense.

2 So, if the soldiers are left to wonder,
3 is somebody later going to say I had authority to say
4 this or not? And certainly classified information
5 gives a soldier notice on what you can put out.

6 And, if a soldier then says, you know
7 what, I know the classified information, I know my
8 nondisclosure agreement, I shouldn't put this out, I
9 feel it's important that it gets out. I'm willing to
10 accept responsibility for it or accept the possible
11 consequences, I want this information out.

12 And that soldier puts the information
13 out. I think what the soldier might think he or she
14 could expect is perhaps, you know, various Article 92
15 violations, 793, a creative prosecutor might throw in
16 there 641, 1030, depending how you got it.

17 But a 104 offense, without more, that is
18 where you have a problem. And what the Government's
19 burden should be is that to show actual knowledge in
20 that generally evil intent, even though it's not a
21 specific intent requirement, would be what the Defense

1 argues is the closest thing to arguing that there has
2 to be something more than just he should have known by
3 putting this out. Should have known because of the
4 type of information, because of training, should have
5 known the enemy would get it. There has to be
6 something more. Subject to your questions.

7 THE COURT: Thank you.

8 CAPTAIN OVERGAARD: Ma'am, the issue of the
9 definition of knowledge, the Government would like to
10 point the Court and the Defense to definition in the
11 UCMJ of actual knowledge under giving intelligence to
12 the enemy, which is the charge in this case, which
13 states actual knowledge is required but may be proved
14 by circumstantial evidence.

15 The Government would also request that
16 perhaps the Court could amend the draft instructions to
17 include that instruction in the 104 draft instructions.

18 THE COURT: What are you looking at?

19 CAPTAIN OVERGAARD: In UCMJ. Article 104C5C.

20 THE COURT: That's an evidentiary instruction
21 the Court normally gives in such cases.

1 CAPTAIN OVERGAARD: Yes, ma'am. And it was
2 included in the knowledge definition in the Spec 1 of
3 Charge 2 but not in Article 104. The Court actually
4 did refer to that in respect to Article 104 in a
5 different appellate exhibit, in a different ruling that
6 you had, Ma'am. But it was not included in the draft
7 instructions.

8 THE COURT: The draft instructions here talk
9 about elements and definitions. Knowledge proved by
10 circumstantial evidence is an evidentiary instruction
11 that is given in virtually every case where knowledge
12 is an issue. Should this have been a (inaudible), I
13 would have included it.

14 CAPTAIN OVERGAARD: This is not issue of
15 first impression. We provided the relevant case law.
16 The Government is not prepared to brief that again
17 today.

18 THE COURT: (Inaudible)

19 CAPTAIN OVERGAARD: This is precedent for
20 charging this type of case. We have provided case law
21 precedent.

1 THE COURT: Is that the case where, I forgot
2 the name of the case, where someone was attempting to
3 get information to an enemy by publishing troop
4 whereabouts?

5 CAPTAIN OVERGAARD: In the newspaper.

6 THE COURT: Was the accused act trying to
7 reach the enemy?

8 CAPTAIN OVERGAARD: I would have to review
9 the case on that. I wasn't prepared to brief that
10 today, as we have briefed that in the past.

11 THE COURT: Does the Government --

12 CAPTAIN OVERGAARD: The Government is not
13 contending that the accused should have known. The
14 Government is contending that the accused did know.
15 And it would be nice if we had a videotaped confession
16 saying that, I knew by leaking information to
17 WikiLeaks that it would go. We don't have that in
18 this case.

19 The Government offered a mountain of
20 circumstantial evidence, which is recounted in 10 pages
21 of factual information in this brief of the evidence

1 that we did elicit that shows that the accused did, in
2 fact, know that by publishing information, leaking
3 information to WikiLeaks, and having it published on
4 the internet, that it was, in fact, going to al Qaida.

5 THE COURT: I have asked this question of the
6 Government before, and I'll ask it one more time. Does
7 it make any difference if it's WikiLeaks or any other
8 news organization or any other -- any news
9 organization -- New York Times, Washington Post, or
10 Wall Street Journal?

11 CAPTAIN OVERGAARD: Yes, ma'am. One moment,
12 please. As I said no, it would not. It would not
13 potentially make a difference. It would depend on the
14 facts of the case. In this case we have a trained
15 intel analyst. We showed evidence physically that this
16 accused was trained by the military on the enemy,
17 particularly al-Qaida, Osama bin Laden, and its use of
18 the internet, United States shows the accused was
19 trained by the military and the types of information
20 the enemy would be seeking on the internet and even
21 gave a PowerPoint brief to his own unit on that

1 information.

2 The Government showed that the accused
3 was informed of how WikiLeaks conducted business by
4 its own searches during the commission of this conduct
5 actually acknowledged those discussion and those chats
6 that the Government had in its brief with Julian
7 Assange and Adrian Lamo, that he knew exactly what he
8 was doing in disclosing those.

9 THE COURT: The issue really isn't did the
10 accused know what he was doing when he disclosed the
11 information that it would be published. The
12 information is did he know that by that publication
13 that al-Qaida and al-Qaida in the Arabian Peninsula
14 would access it.

15 What's the Government's specific
16 information on that?

17 CAPTAIN OVERGAARD: He was trained
18 specifically, that al-Qaida used the internet to get
19 this information, that the enemy was looking for this
20 specific type of information and even the Government by
21 its own brief that he gave on that information. Which

1 was, we need to protect for optic purposes information
2 that was mission critical, dates, time, location,
3 personnel information, military access, public access,
4 capabilities, vulnerabilities, events, methods,
5 equipment and additional information, ma'am, that he
6 specifically breached because we need to protect that
7 from, he said hackers, terrorists and used specific
8 examples why the information needs to be protected.

9 That was back in AIT. After AIT he
10 received additional training.

11 THE COURT: In my understanding the
12 Government's position. You are basically focusing on
13 Pfc Manning's individual circumstances and training and
14 experience. And that might distinguish him from
15 someone else in an Article 104 setting who basically
16 had no knowledge of intelligence.

17 CAPTAIN OVERGAARD: That is absolutely true.
18 Pfc Manning is distinct from an infantryman or a truck
19 driver because he had all the training. And this was
20 his job. He knew exactly what he was doing. He knew
21 exactly the consequences of his actions.

1 He was trained on that repeatedly.
2 That's what he did as his daily job. He briefed on the
3 enemy. He was relied upon to brief on the enemy. He
4 briefed on the information that was in the leaked
5 information. He was relied upon to do that.

6 THE COURT: What is the Government's position
7 with respect to the Defense's arguments on the -- a
8 ASIG report with a question mark and the intelligence
9 gaps?

10 CAPTAIN OVERGAARD: The Government would say
11 that's a great argument for the Defense to make in
12 their closing, but for one, the 917 standard is that
13 some evidence, construed in the light most favorable
14 the prosecution.

15 But the other evidence that the
16 prosecution is that the document itself said it must
17 foreign adversary for review and access any DoD
18 (reading) and access was made even more obvious to the
19 accused than pursuit that argument was made more
20 obvious to the accused what he did leak, putting that
21 information that he knew the enemy was seeking on

1 WikiLeaks.

2 THE COURT: Where in the evidence can the
3 Court find dates of release or the CID, CIDNE and Iraq
4 and Afghanistan appropriate dates where what was found
5 and when.

6 CAPTAIN OVERGAARD: When the particular
7 evidence was released, ma'am, by the accused or by
8 WikiLeaks?

9 THE COURT: What evidence has the Government
10 presented? Where can the Court find this?

11 CAPTAIN OVERGAARD: Taking judicial notice of
12 some of the release dates.

13 THE COURT: Not the WikiLeaks. Where the
14 Sydney and Iraq and Afghanistan databases, the
15 forensics?

16 CAPTAIN OVERGAARD: One moment, Ma'am.

17 CAPTAIN MORROW: What is the question?

18 THE COURT: Should the Court decide to look
19 at the forensics in this case, where is the, where can
20 the Court find -- where does the Government believe in
21 its presentation of the case that the Court can find

1 evidence of the CIDNE, Iraq and Afghanistan, I guess
2 progression from where it began, how it got to
3 WikiLeaks?

4 CAPTAIN MORROW: The stipulation of expected
5 testimony -- Patrick --

6 MR. FEIN: Prosecution Exhibit 116, Your
7 Honor, has dates at least when the information was
8 pulled.

9 CAPTAIN OVERGAARD: He actually narrowed down
10 based on some of the changes in the database to a
11 particular (inaudible). That's documented in that
12 stipulation.

13 THE COURT: Thank you.

14 What is the Government's position
15 that -- high enough standard to meet the burden of
16 actual knowledge?

17 CAPTAIN OVERGAARD: The Government is arguing
18 that he did know, Ma'am.

19 THE COURT: My question is, should have
20 known, is that enough to equal actual knowledge?

21 CAPTAIN OVERGAARD: One moment, please.

1 (Pause)

2 CAPTAIN OVERGAARD: Ma'am, the Government
3 does not contend "should have known" is proof of actual
4 knowledge.

5 THE COURT: Thank you. Final words from the
6 Defense.

7 MR. COOMBS: Your Honor, the Government said
8 it would be nice if we had a taped confession. We
9 don't have a taped confession, but they do. They have
10 got the chats between my client and Adrian Lamo. They
11 have got the chats between my client and the person
12 they believe is Julian Assange. They have got multiple
13 emails between my client and other individuals when
14 they talked about charge releases.

15 THE COURT: Were those introduced in
16 evidence?

17 MR. COOMBS: They have between my client and
18 Daniel Smiegel. You look at that, that's their taped
19 confession. What you see in that; what you see is him
20 talking about why he did this, to get individuals to
21 talk about this, to spark reform. Nowhere in there is

1 the conversation is, I know al-Qaida, al-Qaida of the
2 Arabian Peninsula is going to get this information.

3 In fact, nowhere in any of the
4 conversation that the Government had admitted does he
5 talk about al-Qaida, al-Qaida of the Arabian Peninsula,
6 Osama ben ladin or any other potential enemy. That's
7 not at all discussed.

8 What is discussed is a single focus of,
9 I thought this information had to get out. And I
10 wanted it to spark reforms. I was encouraged by the
11 response to the Apache video. That's the type of stuff
12 coming out from the taped confession that we have.

13 And that is the circumstantial evidence
14 of his intent. You look at the internet. The
15 Government said there's a difference between Pfc
16 Manning and an infantryman or a truck driver. Well,
17 infantrymen and now women certainly know that the
18 internet is a big place. Everybody knows that. If you
19 have any type of computer knowledge, you know the
20 internet is a very vast place and anyone who has
21 internet connection can go anywhere on that internet.

1 But there are multiple websites out
2 there. And sites that, if you spend your entire life
3 you would never be able to visit. So one of those
4 sites in this case that's relevant in this case is
5 WikiLeaks.

6 So now the question is, what evidence do
7 we have the enemy went to WikiLeaks. We know about
8 the Asig document. You also have Shelia Glenn's
9 testimony saying, at the time this was drafted they had
10 no intelligence of whether or not the enemy went to
11 WikiLeaks.

12 This is in 2008, shortly before the
13 charge of misconduct in this case. She was asked, like
14 where you get your information for these type of
15 documents? And sometimes it's a request for them to do
16 something and sometimes they do it on their own. This
17 was, we did it on our own. It wasn't a request by
18 anybody here.

19 Every time that they had some sort of
20 intelligence, and they went out everywhere to get all
21 the intelligence to combine in this document, if they

1 had an intelligence source for a particular fact or
2 information, it would be cited in the ASIG document.

3 And when you look at presumption or
4 anything else, there is no source. That's because, as
5 Shelia testified, the United States Army, as of the
6 2008, the time this was drafted, did not know whether
7 or not the enemy went to WikiLeaks.

8 And, if you are going to ascribe some
9 sort of special knowledge to a junior analyst right
10 outside of AIT, I think you would ascribe a little bit
11 more knowledge to who should be the trained
12 professionals, who had been doing this, I can't
13 remember now how long she said she had been doing this,
14 but this is what they do.

15 And they essentially have people
16 slightly more knowledgeable than my client on intel
17 analyst, analysis of information. And they don't know.
18 And yet somehow the Government wants you to ascribe
19 knowledge to my client.

20 Where is the line, if you are going to
21 ascribe some special knowledge, where is the line then?

1 And the Court did ask, you know, should have known be
2 enough for you? The Government had to think about that
3 for a moment. They came back and said, no, okay.
4 Should have known is not enough.

5 So how far more off that line do you
6 have to go before you say, yes, there's a 104 offense?
7 The Defense's position that Olsen is the case that is
8 instructive on this. That's the general evil intent.
9 That's the line. And then going into actual knowledge.

10 And the Government has offered no
11 evidence of that. Every bit of evidence they have
12 offered goes towards the should have known. And the
13 hindsight is 20/20 type standard.

14 So basically they are trying to punish
15 him for being an intel analyst, going to AIT and
16 information he should have known. That's not a 104
17 offense, Your Honor.

18 THE COURT: Thank you.

19 MR. FEIN: Can I state a question for
20 clarification. When you asked earlier for the dates
21 for the CIDNE databases, we presume it's because --

1 that is some of the confidential information, the
2 Government is alleging was compromised and going to
3 aiding the enemy charge. There is two other categories
4 of information. Does the Court want those dates as
5 well?

6 THE COURT: Yes.

7 MR. FEIN: Your Honor, it's the Apache video.
8 And if the Court references PE127, which is the volume
9 .txt file, Prosecution Exhibit 127. That's the volume
10 .txt data. That data is February, '10.

11 The third, Your Honor, is Department of
12 State cable information. And there is two different
13 prosecution exhibits to reference there. Prosecution
14 Exhibit 158, which is a classified summary, the
15 Department server logs. And Prosecution Exhibit 159,
16 which is an unclassified firewall log summary. And
17 those show the date 28 March.

18 THE COURT: Hold on. 159 again?

19 MR. FEIN: 159, Department of State firewall
20 log summary.

21 THE COURT: The date was?

1 MR. FEIN: 28 March 2010.

2 THE COURT: Okay. I thought you said there
3 were three?

4 MAJOR FEIN: Ma'am, when I said three, that
5 included CIDNE database, Apache video and the
6 Department of State cables.

7 THE COURT: So the CIDNE database, Apache --
8 CIDNE database rely on what exhibits and what date?

9 MAJOR FEIN: There are multiple exhibits for
10 the CIDNE databases. But the one the United States
11 offered before was Prosecution Exhibit 116.

12 THE COURT: What was the date?

13 MAJOR FEIN: Stipulated testimony from Mr.
14 Wholefeld. The dates there, Your Honor, is the two
15 databases were pulled at different times. First the
16 CIDNE database was pulled between -- I'm sorry. I know
17 you are asking for the date. Was 7 Jan 2010. CIDNE
18 database was pulled on 3 January 2010.

19 THE COURT: 3 January.

20 MAJOR FEIN: Yes, Ma'am. For CIDNE I.

21 THE COURT: And for the CIDNE A and I

1 databases, what is the Government's theory, what
2 exhibits has the Government offered in advance of that
3 on when Pfc Manning allegedly sent them to WikiLeaks?

4 MAJOR FEIN: Yes, Ma'am. United States
5 prosecution -- I'm trying to find the number, Your
6 Honor. That occurred sometime end of January 2000.
7 Rely upon the fact that the, a CD was burned after the
8 wiping of the computer. Do you recall that testimony
9 from Special Agent Shaver.

10 THE COURT: So look to Special Agent Shaver's
11 testimony.

12 CAPTAIN MORROW: Also with respect to when
13 the data got -- was created as an encrypted file that
14 included the (inaudible)

15 MAJOR FEIN: So Prosecution Exhibit 92 is the
16 SD card that contained that file and contained those
17 events based on Special Agent Shaver's testimony.

18 THE COURT: Anything else either side wants
19 to state with respect to this motion?

20 MR. COOMBS: No, Your Honor.

21 THE COURT: The Court is taking these two

1 motions under advisement. And we'll have -- the plan
2 is to have a ruling by Thursday morning to read.

3 We have one issue left to address. And
4 that is the Government's proposed rebuttal. Would the
5 parties like a brief recess before we do that?

6 MAJOR FEIN: Yes, Ma'am. And the United
7 States would request a brief 802 during recess.

8 THE COURT: How long do you think that all
9 this should take?

10 MAJOR FEIN: 15 minutes, Your Honor.

11 THE COURT: Let's take a 20 minute recess.
12 Court is in recess until ten minutes to 18 --

13 (Brief Recess)

14 THE COURT: The Court is called to order.
15 Let the record reflect all parties are present.
16 (inaudible)

17 The parties and I had a brief 802
18 conference before coming on today. That again is a
19 conference where the parties raise issues that may
20 arise during the trial or we discuss scheduling and
21 logistics. And put what was discussed on the record at

1 the next open session.

2 And major Fein, the 802 involved the
3 email that was given to you by the Defense?

4 MR. FEIN: Yes, Ma'am. We asked for that in
5 order to give notice to the Court that the United
6 States was going to request the opportunity to recall
7 Chief Ehresman to I guess continue cross examination
8 based off this email.

9 We will get ahold of him either tonight
10 tomorrow to determine if his testimony would have
11 changed; and if so, we would recall him. If not, then
12 we would continue.

13 THE COURT: Okay. And the email has been
14 marked?

15 MAJOR FEIN: It has not. We'll have it
16 marked right now.

17 THE COURT: Okay. Appellate 605. Defense.

18 MR. COOMBS: Your Honor, our position would
19 be -- of course, we'll wait until the Government says
20 they are going to try to call him back. Our position
21 would be that that email is not inconsistent with

1 anything they put out in his testimony. We'll have to
2 review the exact testimony from the record. And also,
3 it is on such a remote fact that the Government should
4 not be allowed to reopen its cross examination of this
5 witness.

6 THE COURT: Okay. If you want to recall him
7 Thursday morning and reopen your case, I'll let you do
8 it.

9 MAJOR FEIN: Yes, ma'am.

10 THE COURT: Okay. Now at issue we have the
11 Prosecution's notice of potential rebuttal case. And
12 Defense, I understand your opposing it in its entirety?

13 MR. COOMBS: Yes, ma'am.

14 THE COURT: Okay. Government, why don't you
15 step put on the record what you want to rebut; do
16 witness by witness and then I'll hear from the Defense.

17 CAPTAIN OVERGAARD: Yes, Ma'am. Government
18 also notes that, as we discussed we are -- 802 issue
19 it's Appellate Exhibit 287. Government is requesting
20 to --

21 THE COURT: So that information, you're going

1 to recall Mrs. Showman for that information that was
2 discussed to rebut what you have in here basically, the
3 motive evidence?

4 CAPTAIN OVERGAARD: Yes, Your Honor. We are
5 talking about the Act 2 that was cited in your
6 Appellate Exhibit 287, Ma'am.

7 THE COURT: Can I see Appellate Exhibit 287,
8 please.

9 (Pause)

10 CAPTAIN OVERGAARD: United States would like
11 to recall Mrs. Showman to rebut the motive evidence the
12 Defense elicited from Mrs. Warren McNamara in the
13 February 2009 to the August 2009, would have been the
14 pre-deployment timeframe.

15 And Ms. McNamara and her testimony said
16 words to the effect of, the accused told her that I can
17 apply what I learned to provide information to my
18 officers and commanders and hopefully save lives.

19 And Defense proffered that they were
20 admitting the plan for motive for what the accused was
21 intending to do, intended to do with the information,

1 that he was trying to help his unit.

2 Ms. McNamara also said Pfc Manning told
3 her that, I was concerned with saving lives of families
4 in foreign countries and other noncombatants and just
5 the families of soldiers and soldiers themselves making
6 sure they go home safe.

7 So the Government would like to offer
8 the evidence, the statement, of what Ms. Showman said
9 the accused said to her to rebut the accused plan and
10 motive evidence that was offered --

11 MAJOR FEIN: So as to Manning.

12 MAJOR HURLEY: Your Honor, would be easier
13 for you if we went witness by witness.

14 THE COURT: Yes. I already said that.

15 MAJOR HURLEY: With respect to the testimony
16 of Ms. Showman. First, we would indicate, and we are
17 glad the Government has indicated with specificity what
18 facts that they want that were elicited during our case
19 in chief that they wish to rebut.

20 We would point out the specific facts
21 that Ms. McNamara talked about. You have the chat to

1 use as a guidance as you go through what specific
2 things Ms. McNamara and my client, Pfc Manning talked
3 about.

4 And view that evidence in light of the
5 evidence that you understand from Ms. Showman will be
6 evidence. That how does that evidence from Ms. Showman
7 will be evidence, rebut the 8033 motive intent plan
8 evidence that we were able to deduce from Ms. McNamara.

9 CAPTAIN OVERGAARD: The Government would say
10 it shows Pfc Manning's pre-deployment state of mind in
11 the same time period that was elicited from Ms.
12 McNamara. It shows -- directly rebuts that the accused
13 allegedly had some noble motive.

14 THE COURT: I'm going to allow it.

15 MAJOR HURLEY: Yes, ma'am.

16 CAPTAIN OVERGAARD: United States also would
17 like to call Specialist Marshal to rebut the motive
18 evidence that the Defense elicited from Sergeant Sadler
19 in the March 2009 deployment time period.

20 THE COURT: And what is that?

21 CAPTAIN OVERGAARD: Actually the time period

1 is actually contingent upon the next request for
2 rebuttal. Maybe we should skip to that one first?

3 THE COURT: Wait a minute. A specific
4 SigAct?

5 CAPTAIN OVERGAARD: Yes, Ma'am.

6 THE COURT: You want me to go to that next?

7 CAPTAIN OVERGAARD: That would make more
8 sense actually. United States asks to recall Special
9 Agent Shaver to discuss a SigAct dated in the
10 March 2010 time period to expand upon the testimony of
11 Sergeant Sadler that he felt the incident the accused
12 approached him about with the documentation involving
13 Iraqi nationals taking place around December of 2009.

14 The government would like to introduce
15 the SigAct addressing that particular information,
16 which is dated March 2010, just to provide clarity to
17 the exhibit timing.

18 THE COURT: So if I understand what you are
19 trying to do, Sergeant Sadler testified that he had
20 come to being deployed on or about December, before or
21 after Christmas, and spoke with Pfc Manning sometime

1 maybe a month afterwards regarding a particular SigAct.
2 You're intending to bring this witness to show the same
3 SigAct that is dated --

4 CAPTAIN OVERGAARD: It shows when that
5 actually took place. This is to provide clarity on the
6 timing of the particular evidence. It wasn't
7 December 2009 time period. It was May 2010.

8 The Government believes that the timing
9 of this potential evidence, seemed to be proffered, or
10 argued based on their opening, is that Defense is
11 trying to offer some evidence to show state of mind.

12 And the Government is simply offering
13 that this evidence is relevant, because it shows it
14 didn't take place in the December 2009 time period. It
15 took place after all the misconduct, which is in
16 March 2010.

17 THE COURT: Defense?

18 MAJOR HURLEY: Ma'am, one second, please.
19 Our first comment would be that they had this
20 information. The Government was well aware of the
21 timing of this information and what, if any, effect it

1 might have had on Pfc Manning's state of mind prior to
2 Sergeant Sadler taking the stand.

3 So they could have used the SigAct.

4 They could have admitted the SigAct. And then use the
5 SigAct with Sergeant Sadler to better lock it in time.

6 Now the problem is this. Special Agent
7 Shaver, not a member of 210 Mountain, is going to take
8 the stand and say, yep, I found this SigAct, it was
9 among the SigActs dated March. And ask you, as trier
10 of fact, then to say from your memory, well, Sergeant
11 Sadler told me it was about this, so this appears to be
12 the same thing, when there was an opportunity to make
13 it clear to the trier of fact exactly what this
14 evidence was. So that the witness himself could say
15 yes or no to it.

16 So our objection would is, beyond the
17 scope of the appropriate rebuttal. And its relevance
18 is very ancillary fact, whether something occurred in
19 December of 2009, according to the testimony of
20 Sergeant Sadler, or whether it occurred in March of
21 2009, you're talking about you at least view it from

1 the Government's perspective, just a part of the time
2 period in which the accused was allegedly committing
3 these crimes.

4 THE COURT: Once again, I disagree. I think
5 it's proper rebuttal to Sergeant Sadler's testimony.
6 The motive evidence and relevance and when it occurred
7 is relevant. So I will allow that. If either sides
8 wants to recall Sergeant Sadler, feel free to do that
9 as well.

10 CAPTAIN OVERGAARD: So going back to the
11 previous one, the United States elects to call
12 Specialist Marshal to rebut the motive evidence that
13 was solicited from Sergeant Sadler in the 2010
14 deployment timeframe.

15 THE COURT: What is he going to tell me?

16 CAPTAIN OVERGAARD: Specialist Marshal will
17 say words to the effect, I would be shocked if you were
18 not telling your kids about me 10 to 15 years from now.
19 And that was in May of 2010.

20 THE COURT: Say that again.

21 CAPTAIN OVERGAARD: I would be shocked if you

1 are not telling your kids about me in 10 to 15 years
2 from now.

3 MR. FEIN: To clarify, Pfc Manning said that
4 to Marshal.

5 CAPTAIN OVERGAARD: The Government argues
6 that, again, the Defense has offered that there has
7 been some sort of noble motive based on what the
8 accused saw occurring in Iraq. However, this would
9 show completely the opposite. It would show that
10 instead of having a noble motive, he was seeking
11 notoriety. And it goes again to motive and his state
12 of mind.

13 MAJOR HURLEY: With respect to this testimony
14 by Specialist Marshal, his testimony that the
15 Government indicated the conversation occurred
16 allegedly in May of 2010.

17 THE COURT: March or May?

18 CAPTAIN OVERGAARD: The statement of
19 Specialist Marshal was in May 2010.

20 MAJOR HURLEY: So may 2010 is when the
21 conversation occurred allegedly with Specialist

1 Marshal. And the information the Government wants to
2 rebut that the conversation between Pfc Manning and
3 Sergeant Pagent occurred in February or March of 2010.

4 THE COURT: Pagent or Sadler?

5 MAJOR HURLEY: Sadler. I think my record
6 with names in this Court is fairly established.
7 Sergeant Sadler. Ma'am, I apologize.

8 THE COURT: That's fine.

9 MAJOR HURLEY: We would say that temporal
10 distinction is beyond the scope of appropriate
11 rebuttal.

12 THE COURT: Well, let me ask the parties
13 positions on here. The parties recollection that
14 Sergeant Sadler that he made this conversation in
15 March?

16 CAPTAIN OVERGAARD: No, ma'am. Which is why
17 the Government wanted to talk about the next one first.
18 The government would first like to elicit that
19 information.

20 THE COURT: I don't understand what you are
21 trying to do. So Sergeant Sadler --

1 CAPTAIN OVERGAARD: Sergeant Sadler discussed
2 facts that occurred in regard to a specific event that
3 occurred while deployed that Pfc Manning approached him
4 about and that he was -- appeared upset about.
5 Sergeant Sadler couldn't remember --

6 THE COURT: I understand all that. I'm
7 looking at the timing. The Government alleges this to
8 have happened in March?

9 CAPTAIN OVERGAARD: Yes, Ma'am.

10 THE COURT: Based on Sergeant Sadler's
11 testimony?

12 CAPTAIN OVERGAARD: No, Ma'am. Based on the
13 testimony we will elicit from Special Agent Shaver.
14 And information that's already admitted on the SD card,
15 Ma'am.

16 THE COURT: Okay. I understand what you're
17 talking about.

18 MAJOR HURLEY: The content we would also
19 submit to the Court is quite different and not
20 appropriate for rebuttal. The content, the
21 conversation that he had with Sergeant Sadler and the

1 information that he talked about with Specialist
2 Marshal, the nature of that information is quite
3 different. I wanted to add that additional bit of
4 information.

5 THE COURT: Government, you have already got
6 the Lamo chats in May 2010, right?

7 CAPTAIN OVERGAARD: Yes, Ma'am.

8 THE COURT: Is this evidence going to provide
9 anything additional that I don't already have with the
10 Lamo chats?

11 CAPTAIN OVERGAARD: Hold on, Ma'am.

12 (Pause)

13 Ma'am, the Government does believe that
14 this adds to the Lamo chats. Because this line isn't
15 the knowledge -- Defense just argued the Lamo chats
16 shows motive on the part of the Defense for that same
17 time period, our noble motive.

18 THE COURT: All right. I'll admit that too.
19 It does rebut the motive evidence and the motive
20 evidence has been raised. So go ahead.

21 CAPTAIN OVERGAARD: United States also

1 requests to recall Special Agent Shaver to discuss
2 emails, the accused sent to members of the media, as
3 well as WikiLeaks tweets that were found on EQ's
4 personal Macintosh computer to rebut the evidence
5 offered by the Defense that WikiLeaks operated as a
6 journalistic organization and was considered legitimate
7 journalist organization at least by --

8 THE COURT: Defense?

9 MAJOR HURLEY: It's our position that Special
10 Agent Shaver, computer expert, that information he
11 would elicit would have been required conclusion by
12 trier of fact, the expertise doesn't match up.
13 Professor Finkel said, in his expert opinion he does
14 consider WikiLease a legitimate news organization.
15 And Special Agent Shaver, that's not the area which his
16 expertise lays.

17 And the Government been aware for months
18 and has litigated a motion of whether or not Professor
19 Finkel will testify and this information could have
20 very welcome out in the Government's case in chief.
21 And they knew and understood its import. It's not as

1 though they learned first that Professor Finkel's
2 testimony heard it on the stand and that caused them to
3 revisit and relook at this information. They knew it
4 all along.

5 THE COURT: Well, is the standard that this
6 should have come out in the case in chief or is it the
7 standard that the Defense brought out information and
8 the Government is now bringing information forward to
9 rebut what the Defense brought out?

10 MAJOR HURLEY: You're right that that
11 adequately describe it. But from the accused's the
12 perspective the Government was well on notice is what
13 we would say, because of the extensive litigation we
14 did, the extensive litigation that we did of Professor
15 Finkel that they were aware of it. We would ask in
16 your discretion you foreclose their ability to put this
17 evidence on now.

18 THE COURT: Why would they not introduce it
19 in rebuttal to counteract the evidence Defense
20 introduced.

21 MAJOR HURLEY: May I have a moment.

1 (Pause)

2 Ma'am, I would point the Court's
3 attention give you -- United States versus Murphy, 33
4 MJ323, Court of Military Appeals case.

5 It indicates the proposition that trial
6 counsel who holds back material evidence for possible
7 use, Defense runs the risk that the Military Judge in
8 the exercise of her control of the courtroom and your
9 control of the evidence would foreclose their right,
10 their ability to put that evidence on.

11 THE COURT: All right. Take this one under
12 advisement. Have an opportunity to look at the case.

13 CAPTAIN OVERGAARD: I just offer that the
14 Government contested the relevance of the majority of
15 Professor Benkler's testimony from day one. So the
16 Government didn't know what was going to be elicited
17 and what the Court was going to allow from Professor
18 Benkler.

19 The Government is assuming Defense is
20 going to use that testimony to argue that the accused
21 knew what he did about WikiLeaks. And these

1 particular emails, and these tweets that are found on
2 his media, which is admitted, these are pulled out of,
3 would go directly to rebut that.

4 THE COURT: Okay.

5 CAPTAIN OVERGAARD: The United States also
6 asks to recall Special Agent Shaver to discuss how did
7 he get with run from the accused profile on a SIPRnet
8 computer to counteract the testimony of Chief Ehresman
9 that executable files could be run of a disk.

10 And based on some of the questions the
11 Court asked during 917, the Government would also add
12 that would like to call Special Agent Shaver to talk
13 about videos and music files and how they are run as
14 well, to explain and counteract the evidence offered by
15 Chief Ehresman.

16 THE COURT: So are you asking me to allow
17 Special Agent Shaver's testimony in rebuttal or to
18 reopen your case as part of the RCM 917 --

19 CAPTAIN OVERGAARD: The Government believes
20 rebuttal evidence. It will go the clarify that Wget
21 was introduced on the computer. We will be able to

1 show that in his rebuttal.

2 THE COURT: All right. Defense.

3 MAJOR HURLEY: With respect to the last
4 point. We apologize for not getting up then. If the
5 Defense would just receive the exact tweets and emails
6 that the Government is talking about. We recognize
7 Special Agent Shaver isn't here today. Just so we
8 could start our preparation, just have some
9 understanding of what that information is.

10 Secondly, and to the reason that you
11 called on me just now, it is the position of Defense
12 Special Agent Shaver has already testified about this,
13 unless I misunderstood Captain Morrow's argument when
14 he was talking about the 1030 offense.

15 It seems to me that this testimony was
16 already covered. He was citing the testimony of
17 Special Agent Shaver for these propositions. There is
18 no need to rebut information, Ma'am, with -- you're a
19 sophisticated trier of fact. You can be called upon to
20 recall Special Agent Shaver's testimony, as you have
21 today. And there is no need to bring him back to say

1 this.

2 THE COURT: First of all, with respect to the
3 discovery, any issues?

4 CAPTAIN OVERGAARD: No, Ma'am.

5 THE COURT: Okay. That will be done tonight.

6 CAPTAIN OVERGAARD: Yes, Ma'am.

7 THE COURT: Okay. Is Special Agent Shaver
8 going to testify --

9 MAJOR FEIN: Just to interrupt. Not tonight.
10 Probably have it done tomorrow. Special Agent Shaver
11 is not around.

12 THE COURT: You have the tweets in the
13 information --

14 MAJOR FEIN: Copies. But not the exact
15 copies you would be able to authenticate at trial. We
16 can provide copies, not the actual ones.

17 MAJOR HURLEY: Those are fine. For the
18 purpose of helping us prepare.

19 THE COURT: They want the information that
20 you're going to use. They don't care about format.

21 Is Special Agent Shaver going to testify

1 to anything he hasn't testified about already? As you
2 are answering that, my follow-up question, I don't have
3 that in front of me right now, did he do that testimony
4 in classified, in closed session or did he do it in
5 open session?

6 MAJOR HURLEY: Let me discuss when the Court
7 would want notice of our surrebuttal -- table that --

8 THE COURT: Talk about that. We are going to
9 meet after the trial -- after the proceedings today.

10 CAPTAIN OVERGAARD: The Government believes
11 Special Agent Shaver did actually testify that Wget was
12 run from the accused profile. But based on the
13 testimony of Ehresman that executable files can be run
14 on disk potentially. Some other questions the
15 Government seeks to recall Special Agent Shaver to
16 further explain and clarify how --

17 THE COURT: This will be a conditional ruling
18 because it all depends on how I rule on the 917 motion
19 with respect. Otherwise, it's not relevant, right?

20 CAPTAIN OVERGAARD: It would still
21 potentially be relevant, Ma'am, to unauthorized

1 software in Charge 3, Specifications 2 and 3.

2 THE COURT: Oh, okay.

3 MAJOR HURLEY: Ma'am, the other thing that we
4 would point the court's attention to is Captain
5 Cherepko, who also testified about how these files
6 could be run from disk. Just to say the panoply of
7 evidence that the Court can consider in making its
8 findings that already exist in the record and there is
9 no need to call a rebuttal witness for.

10 THE COURT: Once again, the Court's
11 recollection of the testimony, there have been a
12 variety of different witnesses who testified different
13 things how Wget operates and how its run. So I will
14 allow that.

15 CAPTAIN OVERGAARD: United States would also
16 like to recall an undetermined at this point,
17 additional forensic investigator or witness to discuss
18 how WikiLeaks.org website appeared in 2009 and 2010 to
19 expound upon and counteract the evidence offered by the
20 Defense that WikiLeaks offered as a journalistic
21 organization.

1 THE COURT: That special Agent Shaver can
2 testify?

3 CAPTAIN OVERGAARD: No, Ma'am.

4 THE COURT: Yes.

5 MAJOR HURLEY: We are talking still about a
6 mystery guest that we can't identify. We are talking
7 still about mystery guest, Ma'am, we can't identify
8 with any specificity who this witness is, that is going
9 to talk about how the WikiLeaks folks site appeared in
10 2009 and 2010.

11 The Government indicated again its
12 position of Defense, we are moving this argument
13 around, they have had months. They knew why we
14 ultimately wanted to get Professor Finkel in here to
15 talk. And they could have, and certainly if nothing
16 else, identified a witness rebuttal document as to how
17 they are going to counteract that testimony.

18 So that would be our first objection is
19 that you foreclose the opportunity, this is the notice
20 they have, the time they had to file it. If they can't
21 identify one man, then they should not be allowed to

1 call this individual.

2 Second, we would submit to you there's
3 evidence how the WikiLeaks website appeared in 2009
4 and 2010 already in the record. That we have gone
5 through, discussed, objected, filings on, has been
6 produced. It's here or it's not here. That's
7 sufficient.

8 And whoever this witness is, whatever
9 they might say is not relevant for the Court's
10 consideration. Thank you.

11 THE COURT: Well, first of all, let's talk
12 about the Defense's first objection. You have had --
13 you have had months since we litigated the Motion to
14 Compel Professor Benkler. Why are we here now?

15 MAJOR FEIN: The Government did not know how
16 much testimony the Court would allow from Professor
17 Benkler.

18 THE COURT: You do no preparation and you
19 wait until the relevance ruling and then you start?

20 CAPTAIN OVERGAARD: Ma'am, the Government did
21 not know how much the Court was going to allow

1 Professor Benkler. And the Government has contested
2 the relevance of any of their testimony.

3 THE COURT: All right. What is your second
4 position with respect to the second basis by the
5 Defense that basically the tweets are already in
6 evidence?

7 CAPTAIN OVERGAARD: The government -- there
8 is some evidence of what was on WikiLeaks website but
9 there is more evidence of what appeared on the home
10 page, for example, that would still inform and
11 counteract the evidence offered that WikiLeaks
12 operated as a journalistic organization.

13 The Government agrees that if the
14 Government does not have this witness by Thursday, we
15 are foreclosed from moving forward. However, until
16 that time, Government would just request some latitude.
17 And we had one business day since --

18 MAJOR HURLEY: Again, with respect to -- I
19 find that statement disappointing. The Government had
20 much more time than that. They can make an assumption.
21 This is a legitimate assumption. That's a frustration.

1 The only thing we would want to talk
2 about is, at least what the Government could describe
3 for us today, not 72 hours from now, but today, is what
4 they believe this evidence could be.

5 It's an admonition. It's a page. It's
6 a thing. It's a picture that says X, Y or Z, and we'll
7 find a witness to catch up to it in a minute. And the
8 general nature of the notice they provided to this
9 Court, provided to Defense, provided to my client, Pfc
10 Manning, is not sufficient.

11 We would ask that you foreclose this
12 opportunity today and wait no longer.

13 MAJOR FEIN: If I may, I believe Captain
14 Overgaard wasn't at the 802 conference when the
15 discussed this, with the Court to clear up the record
16 here.

17 When the parties met with the Court to
18 discuss the case calendar for the rebuttal, the
19 Government made a point that, and this was Wednesday
20 after the close of the session, that because we were
21 responding to, the United States was responding to the

1 RCM 917 motions, that we did not have adequate time,
2 because the Defense closed its case so quickly to
3 prepare for the rebuttal case and litigate those
4 motions.

5 And all the parties agreed, and with the
6 Court, that although we would file by Monday morning
7 09, that only give us one business day on Friday to
8 identify people available and where they could come
9 from and who they were. And that we provide as much
10 notice as possible and continued working on it. That's
11 exactly what we did. This was discussed ahead of time.

12 THE COURT: Major Fein, I understand all
13 that. I'm having problems with, you knew Professor
14 Benkler was testifying for months. You made no effort
15 to pull any of these websites, either cross-examine him
16 or have somebody potentially online in rebuttal. You
17 knew what he was going to testify about.

18 MAJOR FEIN: We actually do have people on
19 line. The problem is trying to find them. We have one
20 witness, person identified, as of yesterday emailed,
21 he's going to be employer -- out of town for official

1 business, U.S. Government employee. Gave to
2 organization that pulled website. Can't be any
3 individual. Specific individual that pulled the
4 website in 2009-2010.

5 Individuals who as part of their normal
6 course, just like internet archived, grabs information
7 and brings it down. That's what issue is, Your Honor.
8 U.S. Government official was identified. He's no
9 longer available this week. And now we are trying to
10 find the other individuals. He's assisting us. That
11 was back Friday. Actually, before Friday that we were
12 trying to work on this to get the exact identification
13 of the individual. We only really had Friday to do
14 that full time.

15 In reference to your question about
16 Professor Benkler. He testified he never looked at the
17 website. And he didn't spend that much time. He
18 relied on the press articles. That would be the
19 substance of his entire testimony.

20 THE COURT: That didn't preclude the
21 Government from showing them to it.

1 MAJOR FEIN: Your Honor, that is correct. We
2 could have pulled the website ourselves. And doesn't
3 mean its authenticate. We could have done that.

4 So now what we are asking for is, in
5 order to, in rebuttal, is to potentially, is to get the
6 evidence, the right witness, with a knowledgeable
7 witness. That allows us to counteract the testimony of
8 Professor Benkler.

9 MAJOR HURLEY: The Government indicated the
10 time it needed with the Court. Court okayed it. We
11 were sitting there most assuredly. What we certainly
12 didn't ascent to whatsoever period was the receipt of a
13 rebuttal witness that was a question mark. That's what
14 the Government has done in this case. We would have
15 objection and we would ask you to stop this from going
16 forward for another moment. Thank you.

17 THE COURT: I'll take this under advisement
18 as well. Next.

19 CAPTAIN OVERGAARD: United States also would
20 like to recall Mr. Milliman to explain why it was
21 authorized on a D6A machine, specifically what he may

1 or may not have told Chief Ehresman.

2 THE COURT: Well, you are recalling Chief
3 Ehresman anyway, right?

4 CAPTAIN OVERGAARD: Potentially, Ma'am. We
5 need to reach out to him and based on the email we just
6 received.

7 THE COURT: Defense.

8 MAJOR HURLEY: The first position, much like
9 Special Agent Shaver, I believe with respect to the
10 Wget information, Mr. Milliman has already testified to
11 this, that he's already covered what he understands is
12 authorized, what he understood was not authorized on
13 direct examination. And I'm using the official
14 transcript, he was asked to recall Wget was authorized
15 executable file. He said he didn't understand.

16 THE COURT: Say that one more time.

17 MAJOR HURLEY: On direct examination he was
18 asked if he recalls if Wget was an authorized
19 executable file. That question was posed by Captain
20 Hunter Whyte. His answer was, he does not recall that.
21 On cross examination he talked with Mr.

1 Coombs during the cross examination about the method he
2 would vet whether or not something was authorized or
3 not authorized.

4 So it's the position of the Defense this
5 information Government wants to recall Mr. Milliman for
6 has been covered during its merit case.

7 THE COURT: When did you call Mr. Milliman?

8 CAPTAIN OVERGAARD: Factually, the United
9 States points out that none of the elicited testimony
10 about what could or not be run from a CD.

11 MAJOR HURLEY: Ma'am, in answer to the
12 Court's question, the unofficial draft that we have is
13 12 June.

14 THE COURT: Thank you.

15 (Pause)

16 So Captain Overgaard, it's my
17 understanding you are calling him with limited
18 testimony solely to CDs?

19 CAPTAIN OVERGAARD: Yes, Ma'am. Whether or
20 not I can operate a program from executable files from
21 CDs.

1 THE COURT: I don't believe Mr. Milliman
2 testified about CDs.

3 MAJOR HURLEY: I don't recall. Just one
4 clarification. We don't recall what, if anything, Mr.
5 Milliman said about that. I would have to take a look
6 at his testimony.

7 The clarification we would like is
8 running from CDs wasn't allowed. Is that the point of
9 evidence that the Government wants to get? Or that it
10 wasn't authorized. Not allowed or physically possible.

11 THE COURT: Captain Overgaard.

12 CAPTAIN OVERGAARD: I would ask about both,
13 ma'am.

14 THE COURT: Okay. All right. I'll let you
15 recall him to do that.

16 MAJOR HURLEY: I was going to restate our
17 position but I think the Court is well aware of the
18 position.

19 THE COURT: Yes. If you are limiting it to
20 that. I don't want a recitation of his direct
21 testimony again.

1 CAPTAIN OVERGAARD: Yes, ma'am.

2 The united States would also request
3 that the Court take judicial notice of the entire Dead
4 Soldiers, David Finkel book.

5 THE COURT: Any objection?

6 MAJOR HURLEY: We are at a loss of the
7 relevance, the entirety of the book. Certainly the
8 excerpt we submitted, and the Court is taking judicial
9 notice of, the entire book that we fail to understand
10 what, if any, relevance it has to this particular
11 matter.

12 THE COURT: What is the relevance?

13 CAPTAIN OVERGAARD: There's other information
14 in the book that would have informed the accused
15 knowledge a book should recognize that's been released.
16 In particular, Mr. Finkel included sources and methods
17 and deliberate exclusions from the book. And also the
18 book would reveal that not the entire Apache video
19 transcript was released in the book.

20 MAJOR HURLEY: We would ask what portion of
21 the book and what evidence does the Government have

1 that Pfc Manning read those passages --

2 CAPTAIN OVERGAARD: Evidence that the accused
3 referred to the Finkel book. If defense doesn't plan
4 on arguing that the accused read and understands the
5 book, then that would change the Government's argument.

6 THE COURT: Now I am completely confused.
7 What do you mean?

8 CAPTAIN OVERGAARD: Part of the reason the
9 Government was -- Government assumes that the Defense,
10 relevance of the book, and the point Defense is trying
11 to make judicial notice was that the accused was on
12 notice of some of the alleged information being
13 released. If that's not Defense contention, then
14 Government may have a different position.

15 MAJOR HURLEY: We offered that evidence, the
16 transcript, portion of the book transcribed to
17 underwrite the idea that this is information, closely
18 held today -- was that purpose this is transcript book,
19 since published 2009, is when I first read it.

20 So it's that information and that point
21 of law that we sought the Court to take judicial notice

1 of this matter. And you have taken judicial notice of
2 it. So that's the point. It's not what, if any,
3 notice provided the accused. It's what was out there
4 in the world about this engagement or not out there.
5 And it's the position of Defense, its' established this
6 transcript was out there and was the subject of a good
7 deal of public knowledge.

8 THE COURT: So Defense is not offering this
9 for the element that Pfc Manning had reason to believe
10 that the information, can't remember the exact words,
11 but --

12 MR. COOMBS: On that he was in the Lamo chat.
13 Defense's position on this is, where Pfc Manning was at
14 the time of the publication of the book, the Lamo chat
15 talks about the fact he saw online that Finkel talked
16 about this. And even though this is not, hasn't been
17 introduced in evidence, the Court can consider just
18 about anything making this ruling, the excerpt of the
19 Finkel book that we referenced was available online.
20 That was, when you went to Amazon in order to look at
21 it, that was the excerpt that they released.

1 There's no evidence that my client read
2 the book. So my client was aware of the Finkel book.
3 He was aware of the excerpt and quoted it verbatim. So
4 we would offer it not only for the fact to show it is
5 not closely held but reason to believe on the part of
6 my client.

7 What's missing here, I guess, is the
8 connection, because I haven't read the whole book, if
9 there's other things in the book, there has been no
10 evidence that Pfc Manning read those other things.
11 And, in fact, when you look at the Lamo chat, it's
12 clear that he saw it online. And the book has never
13 been released online. Just that excerpt.

14 So our position would be that the
15 judicial notice request --

16 THE COURT: Well, that's not before me in
17 evidence. The book is online, released online.

18 MR. COOMBS: I grant you that. The Defense's
19 position would be judicial notice request, the
20 relevance of that, would only be if they could show
21 that Pfc Manning read those other excerpts.

1 Because apparently what Captain
2 Overgaard just stated, some other provisions, footnotes
3 or whatnot, that may give you some notice and that goes
4 towards apparently that 104 offense.

5 But, again, that would only be relevant
6 if you show Pfc Manning read that. So what the Court
7 would have the benefit of, I guess, is the Finkel
8 reference in the Lamo chats, whether or not you believe
9 that would mean that Pfc Manning must have read the
10 book and, therefore, it's relevant, judicial notice
11 should be granted, or no evidence that he read the
12 entire book and, therefore, it should not be granted.

13 THE COURT: Okay. Let me ask one more
14 question. You are offering this for two reasons; one
15 is, the closely held and the other one is the reason to
16 believe.

17 With respect to the closely held,
18 there's two pieces of evidence here you are looking for
19 judicial notice for the book; one is footnotes or
20 whatever on sources and methods. The other one is, not
21 the entire transcript was published. What is the

1 second one?

2 CAPTAIN OVERGAARD: Yes, Ma'am. One is the
3 specific page called, on sources and methods. For the
4 book in its entirety it's just to show the Court that
5 the entire was not -- the video was not closely held.
6 I'm sorry, ma'am. Not all of the information in the
7 video was revealed in the book.

8 THE COURT: And there's something else in the
9 book that says it?

10 CAPTAIN OVERGAARD: No, ma'am.

11 THE COURT: That's what I thought I heard you
12 say in the beginning. I misunderstood what you said.

13 MR. COOMBS: I guess on the closely held
14 part, you know, Defense will stipulate that the entire
15 video is not verbatim in Finkel's book. That kind of
16 loses the point. The point is that Finkel had a copy
17 of the video. So then, the video wasn't closely held
18 in order to quote the video.

19 So the passages in the book that do
20 quote the video, quote it verbatim. And it certainly
21 is not a complete verbatim transcript. That's why you

1 have what the Defense offered, a verbatim transcript of
2 P15. That is certainly not in the book.

3 So for that fact it doesn't stipulate of
4 a verbatim transcript of P15 is not contained in the
5 book, as far as the higher transcript. But what is in
6 the book is verbatim from the video.

7 THE COURT: Okay. Well, I remember back day
8 one this is why we watched the whole video.

9 CAPTAIN OVERGAARD: There is actually no
10 evidence in the book that he watched the video, that
11 Finkel watched the video.

12 THE COURT: Is there any other evidence
13 besides the passages -- the passages Defense asked me
14 to take judicial notice that address the video in any
15 way, explain why he has the video, explain a footnote,
16 why it's there?

17 MAJOR FEIN: Your Honor, once again, I'll
18 take over from this point because I read the book.
19 Your Honor, there's no evidence in the book on whether
20 Mr. Finkel ever saw a video. That's conjecture on the
21 Defense's part.

1 Now we have agreed that there's a
2 stipulated transcript of the video. And the Defense is
3 going to argue, we assume in closing, that as the Trier
4 of Fact you should read the two, read the book excerpts
5 and read this.

6 But there's no evidence that he saw the
7 video. There could have been other methods that Mr.
8 Finkel was seeking that information. Government is not
9 arguing the part that we stipulated to, which is that
10 is a transcript of what was made of the video.

11 THE COURT: All right. So what I have is
12 circumstantial evidence that Mr. Finkel saw the video
13 or at least --

14 MAJOR FEIN: For argument, yes, ma'am.

15 THE COURT: So I guess we are really down now
16 nothing else in the book that addresses the video. And
17 Defense stipulated to that. We are down to the sources
18 and methods.

19 MAJOR FEIN: Yes, ma'am. The sources and
20 methods chapter, it's one page in the book, explains
21 exactly his methodology of how he wrote the book and

1 the protections that he gave, where the sources of
2 information came.

3 Now it doesn't talk about first handed
4 counsel. It talks about a bunch of different sources,
5 how he compiled his book. So Defense is able to argue,
6 make this argument that it's an inference that he saw
7 the video, then this section should be relevant to
8 possibly counteract that.

9 And then for the second part, if Defense
10 is able to make the argument that Pfc Manning read any
11 portion of the book, then the entire book, or at least
12 portions that we select by Thursday, should be equally
13 admissible. Because there is no evidence, even in the
14 chat logs, as I'm looking at them now, that there was a
15 certain portion on line. That again is not evidence --

16 THE COURT: I got that.

17 MR. COOMBS: The last point, the evidence
18 there's certain portion was available at least is
19 coming from the Lamo chats where he says Finkel quoted
20 the video verbatim, he had copy of the video.

21 The Government saying that there's no

1 evidence that Mr. Finkel had a copy of the video. Then
2 essentially what they are saying is, well, he could
3 have got an audio version.

4 So really the only way -- I mean I think
5 we all can agree that Mr. Finkel cannot predict without
6 seeing the video or at least hearing the audio of the
7 video what the Apache helicopter crew would have said.
8 And clearly he quotes them verbatim.

9 So he's either seen the video or he's
10 seeing -- he's heard the audio recording. I am unaware
11 of just a simple audio recording. I'm sure the
12 Government is aware of that. They would have offered
13 that in evidence to rebut any idea that the video was
14 not released.

15 THE COURT: Right. This is all closing
16 argument. But right now the -- let me look at Lamo
17 chats. I'll take this under advisement once again. I
18 would like to take a look at the Lamo chats.

19 It seems to me that, if the -- there's
20 nothing in there about getting something from the
21 internet, then there is circumstantial evidence that if

1 you read part of the book, you read the whole book.
2 You don't have to buy that, but it's circumstantial
3 evidence.

4 And the sources and methods too, if it's
5 in one page of a book that somebody might have read, it
6 would make a difference if the book five pages and 500
7 pages as to whether one would see or remember that.

8 So I'll just take that under advisement.

9 Mr. Coombs, if you have any evidence of
10 some online version or that, other than the book, I'm
11 willing to get it. Right now I just don't have any
12 evidence of it.

13 MR. COOMBS: Yes, Your Honor. So what we
14 could do with regards to this judicial notice issue, we
15 could pull the fact that on Amazon.com that was the
16 version, that portion of that book, that's the portion
17 the book that they show on Amazon.com. Even today
18 that's the portion of the book they show.

19 So, when you go to Amazon.com to
20 purchase the book, or even Google books, to purchase
21 it, that's the excerpt they allow you to read to

1 determine do I want to read the rest of this book.

2 THE COURT: If you want to present that as
3 evidence, I'm happy to look at it.

4 MR. COOMBS: Yes, Your Honor.

5 THE COURT: To get back to judicial notice.
6 Is this something I need to decide -- if I make the
7 rest of this decision, we have to decide how we are
8 going to proceed on Thursday. Is this judicial notice
9 question part of that?

10 That is really going towards -- is this
11 part of Government's rebuttal case or is this something
12 that can be decided prior to closing arguments?

13 MAJOR FEIN: It can be done any time except
14 if the Defense does intend to proffer evidence such as
15 what is on Amazon or Google, then we would like a
16 chance to rebut it.

17 THE COURT: I think I'm going to sever this
18 piece of it and make a decision -- not today.

19 MAJOR FEIN: Yes, ma'am.

20 THE COURT: How soon can you get whatever
21 you're going to give to the Government so they can take

1 a look at it?

2 MR. COOMBS: We can pull a portion to show
3 the Government. If there's a authentication issue, we
4 would need to set up a person with knowledge, probably
5 we would use Strutman, our printing expert, to say I
6 went there today, I pulled it.

7 The question would be then, be obviously
8 what existed back in the time that Pfc Manning might
9 have looked at it? For that, if this becomes a huge
10 issue, we could employ the services of Chris Butler to
11 see if perhaps Stanford or some other organization
12 employs him to preserve Amazon.com.

13 THE COURT: Well, again, at this point we are
14 operating under MRE104A. So I can consider hearsay and
15 statements and all of that. So the standard for
16 internet archived material would not be the same as it
17 would be if it was introduced at trial.

18 MR. COOMBS: So I could pull that excerpt and
19 provide that to the Government. And then provide that
20 to the Court as well by email, hopefully tomorrow.

21 Which brings up a point actually. With

1 regards to the 1030 cases, we request that we actually
2 get them by noon tomorrow to present all those cases.

3 THE COURT: Okay. If I get those cases by
4 noon, is the Government going to need any additional
5 time other than --

6 CAPTAIN MORROW: Yes, Ma'am. Which cases are---

7 MAJOR FEIN: By noon the next day.

8 THE COURT: That's fine.

9 MAJOR FEIN: I'll have this marked right now.
10 But here is a today printouts for the motion practice
11 purposes, Amazon.com, Good Soldiers. It actually has
12 note sources and methods on the web page from Amazon.
13 So we'll have it marked versus the Apache video
14 portion.

15 THE COURT: Is that with the Apache video
16 portion?

17 MAJOR FEIN: No. Actually, what comes up a
18 note on sources and methods. It's literally the page
19 we are talking about. This is what comes up on Amazon
20 today.

21 THE COURT: We'll take a recess and you all

1 can get together, and if the Defense thinks something
2 else pulls up, they can show you how and versus and we
3 can go from there.

4 Why don't we revisit this on Thursday
5 morning. Does that work? And exchange whatever issues
6 you can exchange. We'll take a look at it there. And
7 I'll take a look at the Lamo chat in the meantime.

8 Is it the parties position that the only
9 evidence I have before me is what, if anything, Pfc
10 Manning read, as well as the Lamo chats?

11 MAJOR FEIN: Yes, Ma'am.

12 THE COURT: That's it. I have got two left
13 to decide today, which I'm going to need a recess on.
14 And United States versus Murphy, I guess is the case
15 I'm going to be looking at. And the two outstanding
16 ones are recalling Special Agent Shaver and the
17 additional forensic investigator.

18 Is there anything else we need to
19 address at this point?

20 CAPTAIN OVERGAARD: Recalling Special Agent
21 Shaver to discuss the emails, members of the media and

1 the WikiLeaks --

2 THE COURT: All right. Why don't we take a
3 recess then and reconvene at 7:30 or 1930. Is that
4 acceptable to everybody?

5 (Brief Recess).

6 THE COURT: Court is in order. All right.
7 We have -- before we get to the last two issues in
8 Government rebuttal, can anyone recite for me in the
9 Lamo chats exactly where the Finkel book is referenced?

10 MAJOR FEIN: Yes, Ma'am. It's referenced
11 twice. On Page 27 at 3:11:54 p.m. And it's referenced
12 on Page 34 at the very bottom at 2:26:10 a.m.

13 THE COURT: It's page --

14 MAJOR FEIN: Page 34, Your Honor.

15 THE COURT: 2:26 p.m. you said?

16 MAJOR FEIN: No. 2:26 a.m. Bottom of Page
17 34.

18 THE COURT: Thank you. I have taken a look
19 at United States versus Murphy. It basically says,
20 that's really relevant to the second piece of rebuttal
21 evidence. Late notice, discovery, what remedies the

1 Judge has. And I have got everything from to continue
2 basically to excluding the evidence.

3 With respect to the Government's
4 intention to recall Special Agent Shaver to discuss
5 emails Pfc Manning sent to members of the media, as
6 well as WikiLeaks tweaks that were found in his
7 personal Macintosh computer to rebut evidence offered
8 by the Defense that WikiLeaks operated as a
9 journalistic organization, and was considered a
10 legitimate journalistic organization at the time.

11 What's really relevant here is not
12 whether WikiLeaks was a legitimate journalistic
13 organization, it is whether Pfc Manning thought
14 WikiLeaks was a legitimate journalistic organization.

15 So to the extent that those are relevant
16 to rebut the testimony of Professor Benkler, the Court
17 will allow it.

18 Now with respect to the second, the
19 additional forensic investigator, witness to discuss
20 WikiLeaks website, I'm not going to allow the
21 Government to do that. You had months to figure this

1 out. So we are at the last minute here. The Defense,
2 otherwise, I would certainly give the Defense a
3 continuance to be able to address this information.

4 So at this point I think the appropriate
5 remedy, based on the amount of time the Government had
6 to figure this out, is to not allow the evidence. I'm
7 not going to.

8 Anything else we need to address with
9 respect to rebuttal?

10 MAJOR FEIN: No, ma'am.

11 MR. COOMBS: No, ma'am.

12 THE COURT: Are there any other substantive
13 issues we need to address? I understand we need to
14 have the 802 conference to talk about notice for
15 Defense surrebuttal case, how we are going to proceed.
16 But we are going to proceed in some fashion in the next
17 session on Thursday morning. Is that correct?

18 MAJOR FEIN: Yes, Ma'am.

19 THE COURT: For purposes of the public coming
20 back on the record, does either side see any need to do
21 that?

1 MAJOR FEIN: No, Ma'am, not until 0930 on
2 Thursday morning.

3 THE COURT: All right. So for the gallery,
4 members of the public, the next session we will be
5 having in this case here in Court will be at 0930 on
6 Thursday. We will at least be addressing RCM 917
7 motions and presentation of the Government's rebuttal
8 case, and the judicial notice for the entire Finkel
9 book.

10 And then how we proceed from there is
11 what the parties and I are going to discuss after we
12 recess today.

13 THE COURT: Is there anything else we need to
14 address? The court is in recess.

15 (Court adjourned at 7:34 p.m.)
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